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No.

# In the Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, APPELLANT

*v.*

BOSSIER PARISH SCHOOL BOARD

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## APPENDIX TO THE JURISDICTIONAL STATEMENT

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**APPENDIX A**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 94-1495 (LHS (USCA), GK, JR)

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BOSSIER PARISH SCHOOL BOARD, PLAINTIFF

*v.*

JANET RENO, ATTORNEY GENERAL, DEFENDANT,
GEORGE PRICE, ET AL., INTERVENOR-DEFENDANTS

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[Filed: May 1, 1998]

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Before: SILBERMAN, Circuit Judge, and KESSLER and ROBERTSON, District Judges.

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Opinion for the Court filed by Judge ROBERTSON

ROBERTSON, District Judge: This case is before us on remand from the United States Supreme Court for further proceedings consistent with the Court's decision of May 12, 1997, 117 S. Ct. 1491. The parties have agreed that the record should not be reopened for the taking of additional evidence,[1] but they have sub-

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[1] Plaintiff nevertheless argued in a reply memorandum that we should take judicial notice of the results of the 1990 school board election that took place subsequent to our original judgment. Why the school board would at first decline our invita-

mitted additional briefs. After reviewing the record in compliance with the Supreme Court's opinion, we adhere to our decision of November 18, 1995 granting preclearance under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, to the Bossier Parish School Board's redistricting plan ("the Jury plan"). The facts bearing upon our conclusion are all set forth in the opinions issued with our original judgment, 907 F. Supp. 434 (D.D.C. 1995). The reasons for our decision to adhere to that judgment are set forth below.

In compliance with the Supreme Court's instructions, we have considered the relevance of certain "§ 2 evidence" in evaluating the school board's intent for § 5 purposes. We have considered whether the plan in question "has a dilutive impact . . . [making] it 'more probable' that the jurisdiction adopting that plan acted with an intent to retrogress than 'it would be without the evidence.'" 117 S. Ct. at 1501. We have applied the multi-part test articulated in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977), to evaluate the school board's purpose. And, we have "address[ed] appellants' additional arguments that [we] erred in refusing to consider evidence that the board was in violation of an ongoing injunction to remedy any remaining vestiges of [a] dual [school] system." 117 S. Ct. at 1503 (internal quotations omitted).

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tion to reopen the record and then ask us to take judicial notice of the election results is a mystery, but in any case we decline to take judicial notice of the election results. Were we to consider the election results at all, we would need more information about them.



I.

Before carrying out the tasks assigned to us on remand, and particularly before applying the *Arlington Heights* test to the record before us, it is necessary to decide what question we are answering. The Supreme Court was clearly interested in our view as to whether considering all of the evidence, the school board has carried its burden of proving that it did not intend to retrogress. The Court "le[ft] open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." Justice O'Connor's opinion for the Court suggested that we might consider that question on remand.[2] Justices Breyer and Ginsburg were clearly uncomfortable with leaving the question for another day, "for otherwise the District Court will find it difficult to consider the evidence that we say it must consider," 117 S. Ct. at 1504.

We are not certain whether or not we have been invited to answer the question the Court left for another day, but we decline to do so in this case, because the record will not support a conclusion that extends beyond the presence or absence of retrogressive intent. We can imagine a set of facts that would establish a "non-retrogressive, but nevertheless discriminatory, purpose," but those imagined facts are

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[2] "[W]e do not, contrary to Justice STEVENS' view . . . necessarily assume that the Board enacted the Jury plan with some non-retrogressive, but nevertheless discriminatory, 'purpose.' The existence of such a purpose, and its relevance to § 5, are issues to be decided on remand." 117 S.Ct. at 1491.

not present here. The question we will answer, accordingly, is whether the record disproves Bossier Parish's retrogressive intent in adopting the Jury plan.

We must next decide what we mean by "retrogression." The controlling law is clear—up to a point. "Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan . . . [citation omitted]. It also necessarily implies that the jurisdiction's existing plan is the benchmark. . . ." 117 S. Ct. at 1497. Intervenor argues that to search for retrogression in a jurisdiction that has never elected a black person to its school board is a fool's errand, because "it would appear impossible to retrogress from zero." Brief on remand of defendant-intervenors, at 35. But the test of retrogressive intent, in our view, need not depend on the number of black persons elected. The language of *Beer v. United States*, 425 U.S. 130, 96 S. Ct. 1357 (1976), is just as applicable to the "purpose" inquiry as to the "effect" inquiry. Thus, a plan has an impermissible purpose under § 5 if it is intended to "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141, 96 S. Ct. at 1364. That test is broad enough to identify "retrogression" regardless of the outcome of an election, if (to imagine an example not present in this case) polling places were located so that they are less convenient to black voters than before the change, or if (for an example closer to the facts of this case) downward adjustments were made in the percentage of black voters in one or more districts.



II.

In applying the standard set forth above to the record of this case we adhere to our earlier attempt to fashion a method of analysis, set forth in our earlier opinion, 907 F. Supp. at 445-446, that acknowledges the difficulty of the school board's burden to prove the *absence* of discriminatory intent. Thus, we begin again with the observation that the school board's resort to the pre-cleared Jury plan (which it mistakenly thought would easily be pre-cleared) and its focus on the fact that the Jury plan would not require precinct splitting, while the NAACP plan would, were "legitimate, non-discriminatory motives" entitling the school board to a finding that it had presented a *prima facie* case for preclearance.

The first *Arlington Heights* factor is "the impact of the official action—whether it 'bears more heavily on one race than another.'" 429 U.S. at 266, 97 S. Ct. at 564. In this case, the question is whether the Jury plan bears more heavily on blacks than the pre-existing plan. The intervenor, referring to stipulations of record, argues that

> the board knew that the black population was growing in the northern portion of the county, where District 4 of the 1980's plan already had a black voting age population of 42.1 percent. . . . Faced with that information . . . the board chose a plan that extended District 4 to the southeast and decreased the black voting age population to 40.9 percent. . . . The board offered no race-neutral explanation for these changes. Therefore the board failed to carry its burden of proving that such changes were not intended to have their

> forseeable effect: 'to worsen the position of minority voters.'

Brief on Remand of Defendant-Intervenors, at 36-37. That percentage shift in dilution, even though it applies to only one of the twelve districts in question, might indeed be enough to rebut the non-discriminatory reasons advanced by the school board, were it not for the fact that the parties have stipulated the point away, agreeing that this reduction, and the reduction of the black population in another district from 36.9 percent to 36.1 percent, are *de minimis*. Stip. ¶ 252.

The intervenor points to a number of other allegedly dilutive impacts of the Jury plan in support of its discriminatory intent argument: that some of the new districts have no schools, that the plan ignores attendance boundaries, that it does not respect communities of interest, that there is one outlandishly large district, that several of them are not compact, that there is a lack of contiguity, and that the population deviations resulting from the jury plan are greater than the limits (± 5 %) imposed by Louisiana law. Two of those points—failure to respect communities of interest and cutting across attendance boundaries—might support a finding of retrogressive intent, if there were any corroborating evidence that the school board had deliberately attempted to break up voting blocks before they could be established or otherwise to divide and conquer the black vote. In the absence of such evidence in this record, however, the point is too theoretical, and too attenuated, to be probative.

The second *Arlington Heights* factor is the historical background of the school board's adoption of the jury plan. That background is summarized at 907 F.



Supp. 455-56 and provides powerful support for the proposition that the Bossier Parish School Board in fact resisted adopting a redistricting plan that would have created majority black districts. Part of that history is the school board's resistance to court-ordered desegration, and particularly its failure to comply with the order of the United States District Court in *Lemon v. Bossier Parish School Board*, 240 F. Supp. 709 (W.D. La. 1965), *aff'd* 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967), that it maintain a bi-racial committee to "recommend to the School Board ways to attain and maintain a unitary system and to improve education in the parish." Stip. ¶ 111. All of that history is admissible to prove intent. The intent it proves in this case, we think, is a tenacious determination to maintain the status quo. It is not enough to rebut the School Board's *prima facie* showing that it did not intend retrogression.

The remaining *Arlington Heights* factors do not require extended discussion. The specific sequence of events leading up to the school board's decision to adopt the jury plan is discussed in our previous decision at 907 F. Supp. at 448. It does tend to demonstrate the school board's resistance to the NAACP plan; it does not demonstrate retrogressive intent. Evidence in the record tending to establish that the board departed from its normal practices, *see* 907 F. Supp. at 457, establishes rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise, but is not evidence of retrogressive intent. As for the contemporary statements of participants in the board's decision and other de-

tails of legislative history, the several statements made by school board members were discussed at 907 F. Supp. 447-448 and 907 F. Supp. 459. They do not establish retrogressive intent.



SILBERMAN, *Circuit Judge, concurring*: The Supreme Court remanded part of this case primarily because it was uncertain whether we had considered the "dilutive impact" of the Board's redistricting plan as relevant evidence in determining whether it had been adopted for a discriminatory purpose within the meaning of § 5. The term "dilution" has become a rather confusing word of art in § 2 cases, 42 U.S.C. § 1973. *See Abrams v. Johnson*, 117 S. Ct 1925, 1935-38 (1997); *see also Thornburg v. Gingles*, 478 U.S. 30 (1986). The Supreme Court never explicitly defined what it meant by evidence of "dilutive impact"—a phrase that neither the Court, any court of appeals, nor this district court has used in connection with § 2 before—in this case. A careful reading of the opinion suggests, however, that the Court meant only that the plan the Board adopted had less majority black districts than that which could have been created. *See Reno v. Bossier Parish Sch. Bd.*, 117 S. Ct. 1491, 1503 (1997). We, of course, never rejected such evidence; it was the premise of the government's case. "Here defendant argues that the School Board has failed to provide an adequate reason explaining why it declined to act on a proposal featuring two majority-black districts." *Bossier Parish Sch. Bd. v. Reno*, 907 F. Supp. 434, 449 (D.D.C. 1995).

To be sure, we did say we would "not permit § 2 evidence to *prove* discriminatory purpose. . . ." *Id.* at 445 (emphasis added). But we never said that any evidence that would be relevant in a § 2 case would be excluded in a § 5 case. Indeed, in footnote 6 we specifically excluded "evidence relevant *only* to [a] § 2 inquiry," *id.* at 445 n.6, necessarily implying that some evidence could go to both. The Supreme Court

itself recognized that only "some of this '§ 2 evidence' may be relevant" in a § 5 case, *Reno*, 117 S. Ct. at 1501, and, furthermore, "[t]hat evidence of a plan's dilutive impact may be relevant to the § 5 purpose inquiry does not, of course, mean that such evidence is dispositive of [proves] that inquiry." *Id.* at 1502.

The phrase "dilutive impact" was not used in our opinion—nor for that matter in the dissent—because it was not an issue in the case. That the NAACP offered an alternate plan whereby more majority black districts would be created was undisputed. (In that regard, I believe the government's filings in the Supreme Court were deceptive .)[3] The real issue in the case was whether Bossier Parish had an affirmative obligation to create the maximum number of black majority districts. I take it the Supreme Court agrees with us that it did not. "At one point, the District Court correctly stated that 'the adoption of one nonretrogressive plan rather than another nonretrogressive plan that contains more majority-black districts cannot *by itself* give rise to the inference of discriminatory intent.'" *Id.* at 1503, *quoting Bossier Parish*, 907 F. Supp. at 450.

As for the *Arlington Heights* framework which the Supreme Court said should be applied to determine whether the Board had a discriminatory purpose, it should be readily apparent that our previous opinion,

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[3] In its brief on remand, the government, only in passing, refers to the plan's "dilutive impact." Plaintiff asks us to take judicial notice that two blacks have been elected to the School Board since we granted preclearance of the plan. While I doubt that we may take notice of this, it seems anomalous to emphasize, as Judge Kessler does, that no black has ever been elected to the Board. *See* Dissent at 8.



without citing the case, did just that. We carefully considered "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body." *Id.* at 1503, *quoting Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 267-68 (1976). The Court does not indicate that our review of that evidence was in any way inadequate except that it notes that we did not indicate how we viewed the claim that Bossier Parish was in supposed violation of an injunction issued by the western district of Louisiana to unify the school system. We do so now.

KESSLER, *District Court Judge, dissenting.*

This case is before us on remand from the United States Supreme Court for further proceedings consistent with its May 12, 1997 decision in *Reno v. Bossier Parish Sch. Bd., et al.*, 117 S. Ct. 1491. Upon further review and consideration of the record in accordance with the Supreme Court's mandate, I am forced once again to conclude that I cannot in good conscience agree with the result reached by my colleagues. Instead, I remain convinced that "the School Board's decision to adopt the Police Jury redistricting plan was motivated by discriminatory purpose", *Bossier Parish Sch. Bd. v. Reno, et al.*, 907 F. Supp. 434, 463 (D.D.C. 1995) (Kessler, J., dissenting), and should thus be denied preclearance under the Voting Rights Act of 1965, 42 U.S.C. § 1973c ("Voting Rights Act").

I.

In its opinion, the Supreme Court confirmed that "a violation of § 2 [of the Voting Rights Act] is not grounds in and of itself for denying preclearance under § 5 [of the Act]." 117 S. Ct. at 1500. The Court stated that nevertheless, such "[§ 2] evidence of a plan's dilutive impact may be relevant to our § 5 purpose inquiry". 117 S. Ct. at 1502. The Court emphasized that § 2 evidence, while potentially relevant to the § 5 purpose inquiry, is not dispositive of that inquiry. Consequently, the Court directed us to consider and weigh the relevance of "evidence of the dilutive impact of the Board's redistricting plan". *Id.* at 1503.

The Supreme Court also directed us, in conducting our inquiry into the School Board's motivation, to



apply the framework articulated in *Arlington Heights v. Metro. Hous. Dev. Corp., et al.*, 429 U.S. 252 (1977). The *Arlington Heights* framework has been used both to evaluate "whether invidious discriminatory purpose was a motivating factor" in a government body's decisionmaking and also, "at least in part, to evaluate purpose in [the Court's] previous § 5 cases." 117 S. Ct. at 1502 (citing *City of Pleasant Grove v. United States*, 479 U.S. 462, 469-70 (1987)).

My colleagues have limited their § 5 purpose inquiry to a search for intent to retrogress and have declined to consider whether the § 5 inquiry ever extends beyond that search for retrogressive intent. I read the Supreme Court's mandate more broadly. The Supreme Court stated that, while it did not assume "that the Board enacted the Jury plan with some nonretrogressive, but nevertheless discriminatory, 'purpose'[, t]he existence of such a purpose, and its relevance to § 5, are issues to be decided on remand." 117 S. Ct. at 1501. Given the clarity of these words, I fail to see how we can avoid carrying out the Supreme Court's directive to (1) inquire into the existence of "some nonretrogressive, but nevertheless discriminatory, 'purpose'"; and (2) determine the relevance of such a purpose (should one exist) to our § 5 inquiry.

Finally, the Supreme Court directed us to address the government's arguments that the District Court "erred in refusing to consider evidence that the Board was in violation of an ongoing injunction" to attain a

unitary system of education in the Parish.[4] 117 S. Ct. at 1503.

II.

The majority finds that School Board has made out its prima facie case for preclearance. The School Board states that it adopted the Police Jury plan for at least two nondiscriminatory motives—the "plan offered the twin attractions of guaranteed preclearance and easy implementation". 907 F. Supp. at 447. To make out its prima facie case, "the School Board must demonstrate that the proposed change will have no retrogressive effect, and that the change was undertaken without a discriminatory purpose. Proof of nondiscriminatory purpose must include 'legitimate reasons' for settling on the given change." *Id.* at 446 (citing *Richmond v. United States*, 422 U.S. 358, 375 (1975).

I find that the reasons given by the School Board for adopting the Police Jury plan are not at all "legitimate". The majority, in its earlier opinion, conceded that the School Board did not favor the Police Jury plan until "the redistricting process began to cause agitation within the black community", 907 F. Supp. at 447, since the plan "wreaked havoc with the incumbencies of four of the [twelve] School Board members and was not drawn with school locations in mind." *Id.*

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[4] The injunction was imposed on the School Board after it was found liable for intentionally segregating the public schools. *See Lemon v. Bossier Parish Sch. Bd.*, 240 F. Supp. 709 (W.D. La. 1965), *aff'd* 370 F.2d 847 (5th Cir. 1967), *cert. denied* 388 U.S. 911. *See also Lemon v. Bossier Parish Sch. Bd.*, 421 F.2d 121 (5th Cir. 1969); *Lemon v. Bossier Parish Sch. Bd.*, 444 F.2d 1400 (5th Cir. 1971).



The conclusions I reached in my original dissent are as valid now as they were then:

> The Policy Jury plan only became "expedient" when the School Board was publicly confronted with alternative plans demonstrating that majority-black districts could be drawn, and demonstrating that political pressure from the black community was mounting to achieve such a result. The common-sense understanding of these events leads to one conclusion: The Board adopted the Police Jury plan—two years before the next election—in direct response to the presentation of a plan that created majority-black districts. Faced with growing frustration of the black community at being excluded from the electoral process, the only way for the School Board to ensure that no majority-black districts would be created was to quickly adopt the Police Jury plan and put the issue to rest. This sequence of events of "public silence and private decisions," culminating in the Board's hasty decision, is evidence of the Board's discriminatory purpose.

907 F. Supp. at 457-58 (Kessler, J., concurring in part and dissenting in part) (footnote omitted).

The School Board has thus failed to establish a prima facie case that is "supported by 'credible and credited evidence'". 907 F. Supp. at 446 (citation omitted). Its proffered reasons for acceptance of the Police Jury plan are clearly pretextual. This conclusion alone permits us to deny preclearance to the School Board's plan.

A more thorough evaluation of the School Board's intent, under the purpose prong of § 5, only reinforces the necessity of this conclusion and outcome.

III.

The parties agree that the School Board's proposed redistricting plan will not have a retrogressive effect. Resolution of this case thus turns on whether the School Board can demonstrate by a preponderance of the evidence that it did not adopt the plan with an unlawful purpose. The Supreme Court left it to us to decide whether our "purpose" inquiry is limited to a search for retrogressive intent, or whether our inquiry should extend beyond that search.

The Voting Rights Act was enacted by Congress "to 'attac[k] the blight of voting discrimination' across the Nation." 117 S. Ct. at 1496-97 (quoting S. Rep. No. 97-417, 2d Sess., p. 4 (1982) U.S. Code Cong. & Admin. News 1982 pp. 177, 180; *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). Before implementing a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting", a jurisdiction must first obtain either administrative preclearance from the Attorney General or judicial preclearance from the District Court for the District of Columbia. 42 U.S.C. § 1973c. Section 5 of the Act imposes on a jurisdiction the burden of proving that its proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. It is well-settled that a plan has an impermissible effect under § 5 only if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 117 S. Ct. at 1497 (quoting *Beer v. United States*, 425 U.S. 130, 141 (1970)). We must decide whether a plan has an impermissible purpose under § 5 *only* if the jurisdiction intends the plan to "lead to a retrogression", or if an impermissible purpose also includes a "nonretrogressive, but nevertheless discriminatory purpose".



The Supreme Court stated that "Congress enacted § 5, not to maintain the discriminatory status quo, but to stay ahead of efforts by the most resistant jurisdictions to undermine the Act's purpose of 'rid[ding] the country of racial discrimination.'" 117 S. Ct. at 1509 (Stevens, Souter, JJ., dissenting in part and concurring in part). If we were to deny preclearance under § 5 only to those new plans enacted specifically with a retrogressive purpose, however, we would commit ourselves to granting § 5 preclearance to a "resistant" jurisdiction's nonretrogressive plan even if the record demonstrated an intent by that jurisdiction to perpetuate an historically discriminatory status quo by diluting minority voting strength.

Since "a new plan enacted with the purpose of unconstitutionally diluting minority votes is an unconstitutional plan," 117 S. Ct. at 1505 (Breyer, Ginsburg, JJ., concurring in part and concurring in the judgment) (citations omitted), a construction of § 5 that limits its purpose inquiry to a search for retrogressive intent could require us to preclear nonretrogressive but *nevertheless unconstitutional* voting plans. Such a result is clearly inconsistent with the purpose of both the Voting Rights Act in general and § 5 in particular. Along with Justices Breyer and Ginsburg, I do not "believe that Congress would have wanted a § 5 Court (or the Attorney

General) to approve an unconstitutional plan adopted with an unconstitutional purpose." *Id.* at 1506.

I thus join Justices Breyer, Ginsburg, Stevens, and Souter in concluding that "the 'purpose' inquiry does extend beyond the search for retrogressive intent." *Id.* at 1505.

IV.

The Supreme Court stated that § 2 "evidence of the dilutive impact of the Board's redistricting plan" may be relevant in a § 5 proceeding to establish a jurisdiction's "intent to retrogress". *Id.* at 1501. As stated above, however, I find that our § 5 purpose inquiry should extend beyond a search for the jurisdiction's intent to retrogress; I will thus assess the relevance of § 2 evidence to establish not only whether the School Board acted with an intent to retrogress, but also whether it acted with the unconstitutional purpose of diluting minority voting strength. Thus, pursuant to the Court's mandate, I believe we must first consider evidence that would be relevant to the § 2 inquiry on dilutive impact, and second, determine the relevance of that evidence to our § 5 purpose inquiry.

Plaintiffs claiming vote dilution under § 2 must first establish that the racial group "is sufficiently large and geographically compact to constitute a majority in a single-member district". *Id.* at 1498 (citations omitted). In this case, the School Board received, in addition to the plan presented on September 3, 1992, two other plans demonstrating that "it is possible to draw majority-black districts in Bossier Parish which are fully consistent with traditional districting principles." *Bossier Parish Sch. Bd. v. Reno, et al.*, 907 F. Supp. 434, 454 n. 3 (D.D.C. 1995)



(Kessler, J., concurring in part and dissenting in part). Furthermore, the School Board has admitted that it is "obvious that a reasonably compact black-majority district could be drawn in Bossier City." *Id.* (quoting Stip. ¶ 36.)

Second, § 2 plaintiffs must establish that the group is "politically cohesive". In order "to ascertain whether minority members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates", the Supreme Court has directed courts to inquire into the existence of racially polarized voting. *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986). Here, the Stipulations clearly demonstrate that Parish is racially polarized. 907 F. Supp. at 454 (citing Stip. ¶¶ 181-96). Such racial polarization indicates that blacks in Bossier Parish are a "politically cohesive" group.

Third, § 2 plaintiffs must establish that the white majority usually votes as a bloc to defeat the minority's preferred candidate. 117 S. Ct. at 1498 (citations omitted). Parties stipulate, in the record before us, that no black person has been elected to the Bossier Parish School Board despite the fact that 20.1% of the population is black.[5] (Stip.¶¶ 153, 5.) Stipulations

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[5] In his concurrence, Judge Silberman refers to the Plaintiff's request that we take judicial notice that two black individuals were elected to the School Board since the closing of the record before the first District Court opinion. It would be inappropriate in this case to take judicial notice of this fact. First, the Supreme Court explicitly denied the School Board's request to supplement the record in *Reno v. Bossier Parish School Board, et al.*, 517 U.S. 1154 (1996). Second, the parties

¶¶ 181-95 discuss racially polarized voting patterns in Bossier Parish. Analysis of several elections illustrated that, in at least two elections, "the black candidates were the choice of the black voters in these elections, but were not the choice of the white voters." (Stip. ¶ 186; *see also* Stip. ¶¶ 181-95.)

Fourth, plaintiffs claiming § 2 vote dilution "must also demonstrate that the totality of the circumstances supports a finding that the voting scheme is dilutive." 117 S. Ct. at 1498 (citing *Johnson v. DeGrandy*, 512 U.S. 997, 1011, (1994); *Gingles*, 478 U.S. at 50-51). *Gingles* spells out the typical factors which may be relevant to a totality analysis of a § 2 claim. 478 U.S. at 44-45. They include:

(1) "[T]he history of voting-related discrimination in the State or political subdivision". *Id.* at 44. Parties' Stipulations ¶¶ 213-47 discuss the extensive history of official and voting-related discrimination in Bossier Parish.

(2) "[T]he extent to which voting in the elections of the State or political subdivision is racially polarized". *Id.* at 44-45. As already noted, the Stipulations clearly demonstrate that voting in Bossier Parish is racially polarized. 907 F. Supp. at 454 (citing Stip. ¶¶ 181-96).

(3) "[T]he extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group". *Gingles*, 478 U.S. at 45. See, *e.g.*, Stip. ¶¶ 228-29, which discuss the implementation by the State of Louisiana in 1968 and

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specifically agreed in this remand that the record should not be reopened.



1971 of voting procedures, including the adoption of at-large elections and multi-member districts, which the Attorney General found diluted black voting strength.

(4) "[T]he exclusion of members of the minority group from candidate slating processes". *Gingles*, 478 U.S. at 45. We have no evidence indicating that black individuals have been excluded from candidate slating processes.

(5) "[T]he extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process". *Id.* at 45. The parties have stipulated that:

> Education, income, housing and employment are considered standard measures of socioeconomic status. These factors repeatedly have been found to translate into political efficacy . . . Black citizens of Bossier Parish suffer a markedly lower socioeconomic status than their white counterparts. This lower socioeconomic status is traceable to a legacy of racial discrimination affecting Bossier Parish's black citizens.

(Stip.¶¶ 198-99.)

(6) "[T]he use of overt or subtle racial appeals in political campaigns". *Gingles*, 478 U.S. at 45. We have no evidence demonstrating that racial appeals have been used in political campaigns.

(7) "[T]he extent to which members of the minority group have been elected to public office in the jurisdiction". *Id.* The record before us shows that no

black candidate has been elected to the Bossier Parish School Board. (Stip.¶ 153.)

The *Gingles* Court noted that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* (quoting S.Rep. at 29, U.S. Code Cong. & Admin. News 1982, p. 207).

Finally, § 2 plaintiffs "must also postulate a reasonable alternative voting practice to serve as the benchmark "undiluted" voting practice." 117 S. Ct. at 1498 (citing *Holder v. Hall*, 512 U.S. 874, 881 (1994) (plurality opinion)). The School Board has been given several plans showing that it is possible to draw majority-black districts in Bossier Parish in a manner consistent with traditional districting principles. 907 F. Supp. at 454.

Having considered "evidence of the dilutive impact of the Board's redistricting plan", 117 S. Ct. at 1503, I conclude that it overwhelmingly demonstrates the following: the black voting population in Bossier Parish is sufficiently large and geographically compact to constitute a majority in at least two single-member districts; black voters are politically cohesive; the white majority votes sufficiently often as a bloc to enable it repeatedly to defeat the blacks' preferred candidates; and finally, the totality of the circumstances supports a finding that the School Board's plan is dilutive.[6]

It would be impossible to ignore the weight and the relevance of this § 2 evidence to the School Board's

[6] This conclusion is, of course, only reinforced by the School Board's concession that the "plan did dilute black voting strength." (Pl.'s Br. at 21.)



intent to dilute the voting strength of blacks in Bossier Parish.

V.

The Supreme Court has also directed us to apply the framework, articulated in *Arlington Heights v. Metro. Hous. Dev. Corp., et al.*, 429 U.S. 252 (1977), to evaluate the School Board's purpose in adopting the Police Jury plan. 117 S. Ct. at 1503.

In Part II of my initial dissent, I discussed in detail the *Arlington Heights* framework and applied it to this record. *See* 907 F. Supp. at 453-60 (Kessler, J., concurring in part and dissenting in part). Based on that analysis, I believed then, and for the same reasons still believe now, that:

> [T]he only conclusion that can be drawn from the evidence is that the Bossier School Board acted with discriminatory purpose. The adopted plan has a substantial negative impact on the black citizens of Bossier Parish. The sequence of events leading up to the decision show conclusively how the School Board excluded the black community from the redistricting process and rushed to adopt the Police Jury plan only when faced with an alternative plan that provided for black representation. The plan itself ignores and overrides a number of the School Board's normally paramount interests. And the statements of some School Board members certainly lend strength to the other evidence . . . We cannot blind ourselves to the reality of the situation and the record before us.

*Id.* at 460 (Kessler, J., concurring in part and dissenting in part).

The majority has, consistent with the Supreme Court's mandate, also applied the *Arlington Heights* analysis to the record. It examines each of the *Arlington Heights* factors, however, only for the purpose of finding evidence of retrogressive intent. This is far too limited and narrow an inquiry. Since our § 5 purpose inquiry should, in my opinion, extend beyond a search for retrogressive intent, so too should our *Arlington Heights* analysis.

In its analysis of the impact of the Jury plan[7] (the "important starting point" for assessing discriminatory intent under *Arlington Heights*), the majority states that the plan's failure to respect communities of interest and the fact that it cuts across attendance boundaries "might support a finding of retrogressive intent, *if there were any corroborating evidence that the school board had deliberately attempted* to break up voting blocks before they could be established or otherwise to divide and conquer the black vote." Majority Op. at 6-7 (emphasis added). I find nothing in *Arlington Heights* nor in the Supreme Court's opinion in *Bossier* that supports the imposition of the additional requirement of "corroborating evidence" of a jurisdiction's "deliberate[ ] attempt[ ] to . . . divide and conquer the black vote" before evidence of dilutive or disparate impact can be considered relevant to an *Arlington Heights* examination of purpose.

In considering the historical background of the School Board's decision, the majority found that the School Board has resisted court-ordered desegrega-

[7] Plaintiff concedes that "[t]he impact of the School Board plan does fall more heavily on blacks than on whites". (Pl.'s Br. at 12.)



tion and failed to comply with the Court's order in *Lemon v. Bossier Parish Sch. Bd.*, 240 F. Supp. at 709. The majority admits the existence of "powerful support for the proposition that the Bossier Parish School Board in fact resisted adopting a redistricting plan that would have created majority black districts", and concluded that "[a]ll of that history . . . proves in this case, we think, [] a tenacious determination to maintain the status quo." What the majority overlooks or ignores is that the status quo which the School Board is so anxious to maintain is a discriminatory one. Furthermore, the record demonstrates that the School Board hopes to maintain that discriminatory status quo by unconstitutionally diluting black voting strength. Thus, the majority's conclusion (that the School Board acted with an intent to maintain the discriminatory status quo) leads to denial of preclearance to the Jury plan under the purpose prong of § 5.

The majority also finds that "[e]vidence in the record tending to establish that the board departed from its normal practices establishes rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise, but is not evidence of retrogressive intent". Majority Op. at 8 (citations omitted). Such an "improvement in the position of racial minorities", however, is precisely what is necessary to redress the current discriminatory status quo in Bossier Parish. Limiting their inquiry to a search for retrogressive intent only permits my colleagues to all but concede that the School Board acted with a nonretrogressive but nevertheless discriminatory intent. They neverthe-

less grant preclearance under § 5 to the School Board's plan, even though "the purpose part of § 5 prohibits a plan adopted with the purpose of unconstitutionally diluting minority voting strength, whether or not the plan is retrogressive in its effect." 117 S. Ct. at 1506 (Breyer, Ginsburg, JJ., concurring in part and concurring in the judgment).

VI.

Finally, the Supreme Court directed us to "address [the Government's] additional arguments that [the District Court] erred in refusing to consider evidence that the Board was in violation of an ongoing injunction 'to remedy any remaining vestiges of [a] dual [school] system'". 117 S. Ct. at 1503.

My initial dissent considered this evidence and found it relevant since *Arlington Heights* states that "the historical background of the challenged decision" is properly part of the purpose inquiry. 429 U.S. at 267. Since 1965, the Bossier Parish School Board has been the defendant in *Lemon v. Bossier Parish School Board*, Civ.Act. No. 10,687 (W.D. La., filed Dec. 2, 1964). My dissent noted that, "[t]o this day, the School Board remains under direct federal court order to remedy any remaining vestiges of segregation in its schools", and discussed the Board's dismantling of a Biracial Committee "in direct violation of a federal court order". *Id.* at 456. Ultimately, I found that "this history reveals an insidious pattern which cannot be ignored, and must inform our decision today . . . [T]he Bossier Parish School Board's actions effectively eliminate the black community from the political process." *Id.*



I thus again conclude that the School Board's decision to adopt the Police Jury redistricting plan was motivated by a discriminatory, if not necessarily retrogressive, purpose. The evidence overwhelmingly indicates that the Bossier Parish School Board is one of those "most resistant jurisdictions" whose efforts Congress sought to combat when it enacted § 5 of the Voting Rights Act.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civ.A. No. 94-1495 (LHS (USCA), GK, JR)

BOSSIER PARISH SCHOOL BOARD, PLAINTIFF

*v.*

JANET RENO, ATTORNEY GENERAL, DEFENDANT,
GEORGE PRICE, ET AL., INTERVENOR-DEFENDANTS

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[Filed: May 1, 1998]

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**ORDER**

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For the reasons set forth in the opinion issued today by this three-judge court, it is this 1st day of May, 1998,

**ORDERED** that plaintiff Bossier Parish School Board is given pre-clearance for its election plan adopted on October 1, 1992, and that it shall have a declaratory judgment to that effect.

/s/ JAMES ROBERTSON
JAMES ROBERTSON
United States District
Judge for the Court



**APPENDIX B**

# In the Supreme Court of the United States

OCTOBER TERM, 1996

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Nos. 95-1455, 95-1508

JANET RENO, ATTORNEY GENERAL, APPELLANT

*v.*

BOSSIER PARISH SCHOOL BOARD, ET AL.

GEORGE PRICE, ET AL., APPELLANTS

*v.*

BOSSIER PARISH SCHOOL BOARD, ET AL.

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[Argued: Dec. 9, 1996
Decided May 12, 1997*]

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Justice O'CONNOR delivered the opinion of the Court.

Today we clarify the relationship between § 2 and § 5 of the Voting Rights Act of 1965, 79 Stat. 437, 439, as amended, 42 U.S.C. §§ 1973, 1973c. Specifically, we decide two questions: (i) whether preclearance must

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* Together with No. 95-1508, *Price et al. v. Bossier Parish School Board et al.*, also on appeal from the same court.

be denied under § 5 whenever a covered jurisdiction's new voting "standard, practice, or procedure" violates § 2; and (ii) whether evidence that a new "standard, practice, or procedure" has a dilutive impact is always irrelevant to the inquiry whether the covered jurisdiction acted with "the purpose . . . of denying or abridging the right to vote on account of race or color" under § 5. We answer both in the negative.

## I

Appellee Bossier Parish School Board (Board) is a jurisdiction subject to the preclearance requirements of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and must therefore obtain the approval of either the United States Attorney General or the United States District Court for the District of Columbia before implementing any changes to a voting "qualification, prerequisite, standard, practice, or procedure." The Board has 12 members who are elected from single-member districts by majority vote to serve 4-year terms. When the 1990 census revealed wide population disparities among its districts, see App. to Juris. Statement 93a (Stipulations of Fact and Law ¶ 82), the Board decided to redraw the districts to equalize the population distribution.

During this process, the Board considered two redistricting plans. It considered, and initially rejected, the redistricting plan that had been recently adopted by the Bossier Parish Police Jury, the parish's primary governing body (the Jury plan), to govern its own elections. Just months before, the Attorney General had precleared the Jury plan, which



also contained 12 districts. *Id.* at 88a (Stipulations, ¶ 68). None of the 12 districts in the Board's existing plan or in the Jury plan contained a majority of black residents. *Id.* at 93a (Stipulations, ¶ 82) (under 1990 population statistics in the Board's existing districts, the three districts with highest black concentrations contain 46.63%, 43.79%, and 30.13% black residents, respectively); *id.* at 85a (Stipulations, ¶ 59) (population statistics for Jury plan, with none of the plan's 12 districts containing a black majority). Because the Board's adoption of the Jury plan would have maintained the status quo regarding the number of black-majority districts, the parties stipulated that the Jury plan was not "retrogressive." *Id.* at 141a (Stipulations, ¶ 252) ("The . . . plan is not retrogressive to minority voting strength compared to the existing benchmark plan . . ."). Appellant George Price, president of the local chapter of the NAACP, presented the Board with a second option—a plan that created two districts each containing not only a majority of black residents, but a majority of voting-age black residents. *Id.* at 98a (Stipulations, ¶ 98). Over vocal opposition from local residents, black and white alike, the Board voted to adopt the Jury plan as its own, reasoning that the Jury plan would almost certainly be precleared again and that the NAACP plan would require the Board to split 46 electoral precincts.

But the Board's hopes for rapid preclearance were dashed when the Attorney General interposed a formal objection to the Board's plan on the basis of "new information" not available when the Justice Department had precleared the plan for the Police Jury—namely, the NAACP's plan, which demon-

strated that "black residents are sufficiently numerous and geographically compact so as to constitute a majority in two single-member districts." *Id.* at 155a-156a (Attorney General's August 30, 1993, objection letter). The objection letter asserted that the Board's plan violated § 2 of the Act, 42 U.S.C. § 1973, because it "unnecessarily limit[ed] the opportunity for minority voters to elect their candidates of choice," *id.* at 156a, as compared to the new alternative. Relying on 28 C.F.R. § 51.55(b)(2) (1996), which provides that the Attorney General shall withhold preclearance where "necessary to prevent a clear violation of amended Section 2 [42 U.S.C. § 1973]," the Attorney General concluded that the Board's redistricting plan warranted a denial of preclearance under § 5. App. to Juris. Statement 157a. The Attorney General declined to reconsider the decision. *Ibid.*

The Board then filed this action seeking preclearance under § 5 in the District Court for the District of Columbia. Appellant Price and others intervened as defendants. The three-judge panel granted the Board's request for preclearance, over the dissent of one judge. 907 F. Supp. 434, 437 (D.D.C. 1995). The District Court squarely rejected the appellants' contention that a voting change's alleged failure to satisfy § 2 constituted an independent reason to deny preclearance under § 5: "We hold, as has every court that has considered the question, that a political subdivision that does not violate either the 'effect' or the 'purpose' prong of section 5 cannot be denied preclearance because of an alleged section 2 violation." *Id.* at 440-441. Given this holding, the District Court quite properly expressed no opinion on whether the Jury plan in fact violated § 2, and its



refusal to reach out and decide the issue in dicta does not require us, as Justice STEVENS insists, to "assume that the record discloses a 'clear violation' of § 2." See *post*, at 1507-1508 (opinion dissenting in part and concurring in part). That issue has yet to be decided by any court. The District Court did, however, reject appellants' related argument that a court "must still consider evidence of a section 2 violation as evidence of discriminatory purpose under section 5." *Id.* at 445. We noted probable jurisdiction on June 3, 1996. 517 U.S. ___, 116 S. Ct. 1874, 135 L.Ed.2d 171.

## II

The Voting Rights Act of 1965 (Act), 42 U.S.C. § 1973 *et seq.*, was enacted by Congress in 1964 to "attac[k] the blight of voting discrimination" across the Nation. S. Rep. No. 97-417, 2d Sess., p. 4 (1982) U.S. Code Cong. & Admin. News 1982 pp. 177, 180; *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S. Ct. 803, 808, 15 L.Ed.2d 769 (1966). Two of the weapons in the Federal Government's formidable arsenal are § 5 and § 2 of the Act. Although we have consistently understood these sections to combat different evils and, accordingly, to impose very different duties upon the States, see *Holder v. Hall*, 512 U.S. 874, 883, 114 S. Ct. 2581, 2587, 129 L.Ed.2d 687, (1994) (plurality opinion) (noting how the two sections "differ in structure, purpose, and application"), appellants nevertheless ask us to hold that a violation of § 2 is an independent reason to deny preclearance under § 5. Unlike Justice STEVENS, *post*, at 1509-1510, and n. 5 (opinion dissenting in part and concurring in part), we entertain little doubt that the Department of

Justice or other litigants would "routinely" attempt to avail themselves of this new reason for denying preclearance, so that recognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2. Because this would contradict our longstanding interpretation of these two sections of the Act, we reject appellants' position.

Section 5, 42 U.S.C. § 1973c, was enacted as

> "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. . . . Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.'" *Beer v. United States*, 425 U.S. 130, 140, 96 S. Ct. 1357, 1363, 47 L.Ed.2d 629 (1976) (quoting H.R. Rep. No. 94-196, pp. 57-58 (1970)).

In light of this limited purpose, § 5 applies only to certain States and their political subdivisions. Such a covered jurisdiction may not implement any change in a voting "qualification, prerequisite, standard, practice, or procedure" unless it first obtains either administrative preclearance of that change from the Attorney General or judicial preclearance from the District Court for the District of Columbia. 42 U.S.C. § 1973c. To obtain judicial preclearance, the



jurisdiction bears the burden of proving that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Ibid.*; *City of Rome v. United States*, 446 U.S. 156, 183, n. 18, 100 S. Ct. 1548, 1565, n. 18, 64 L.Ed.2d 119 (1980) (covered jurisdiction bears burden of proof). Because § 5 focuses on "freez[ing] election procedures," a plan has an impermissible "effect" under § 5 only if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, *supra*, at 141, 96 S. Ct. at 1364.

Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan. See *Holder*, *supra*, at 883, 114 S. Ct. at 2587 (plurality opinion) ("Under § 5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change"). It also necessarily implies that the jurisdiction's existing plan is the benchmark against which the "effect" of voting changes is measured. In *Beer*, for example, we concluded that the city of New Orleans' reapportionment of its council districts, which created one district with a majority of voting-age blacks where before there had been none, had no discriminatory "effect." 425 U.S. at 141-142, 96 S. Ct. at 1364 ("It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5"). Likewise, in *City of Lockhart v. United States*, 460 U.S. 125, 103 S. Ct.

998, 74 L.Ed.2d 863 (1983), we found that the city's new charter had no retrogressive "effect" even though it maintained the city's prior practice of electing its council members at-large from numbered posts, and instituted a new practice of electing two of the city's four council members every year (instead of electing all the council members every two years). While each practice could "have a discriminatory effect under some circumstances," *id.* at 135, 103 S. Ct. at 1004, the fact remained that "[s]ince the new plan did not increase the degree of discrimination against [the city's Mexican-American population], it was entitled to § 5 preclearance [because it was not retrogressive]," *id.* at 134, 103 S. Ct. at 1004 (emphasis added).

Section 2, on the other hand, was designed as a means of eradicating voting practices that "minimize or cancel out the voting strength and political effectiveness of minority groups," S. Rep. No. 97-417, *supra*, at 28, U.S. Code Cong. & Admin. News 1982 pp. 177, 205. Under this broader mandate, § 2 bars *all* States and their political subdivisions from maintaining any voting "standard, practice, or procedure" that "results in a denial or abridgement of the right . . . to vote on account of race or color." 42 U.S.C. § 1973(a). A voting practice is impermissibly dilutive within the meaning of § 2

> "if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [members of a class defined by race or color] in that its members have less opportunity than other



> members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

A plaintiff claiming vote dilution under § 2 must initially establish that: (i) "[the racial group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; (ii) the group is "politically cohesive"; and (iii) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2766-2767, 92 L.Ed.2d 25 (1986); *Growe v. Emison*, 507 U.S. 25, 40, 113 S. Ct. 1075, 1084, 122 L.Ed.2d 388 (1993). The plaintiff must also demonstrate that the totality of the circumstances supports a finding that the voting scheme is dilutive. *Johnson v. DeGrandy*, 512 U.S. 997, 1011, 114 S. Ct. 2647, 2657, 129 L.Ed.2d 775 (1994); see *Gingles*, *supra*, at 44-45, 106 S. Ct. at 2762-2764 (listing factors to be considered by a court in assessing the totality of the circumstances). Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an "undiluted" practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark "undiluted" voting practice. *Holder v. Hall*, 512 U.S. at 881, 114 S. Ct. at 2586 (plurality opinion); *id.* at 950-951, 114 S. Ct. at 2621-2622 (Blackmun, J., dissenting).

Appellants contend that preclearance must be denied under § 5 whenever a covered jurisdiction's redistricting plan violates § 2. The upshot of this position is to shift the focus of § 5 from nonretro-

gression to vote dilution, and to change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan.

But § 5, we have held, is designed to combat only those effects that are retrogressive. See *supra*, at 1496-1497. To adopt appellants' position, we would have to call into question more than 20 years of precedent interpreting § 5. See, *e.g.*, *Beer*, *supra*; *City of Lockhart*, *supra*. This we decline to do. Section 5 already imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect. See, *e.g.*, *Elkins v. United States*, 364 U.S. 206, 218, 80 S. Ct. 1437, 1445, 4 L.Ed.2d 1669 (1960) ("[A]s a practical matter it is never easy to prove a negative"). To require a jurisdiction to litigate whether its proposed redistricting plan also has a dilutive "result" before it can implement that plan—even if the Attorney General bears the burden of proving that "result"—is to increase further the serious federalism costs already implicated by § 5. See *Miller v. Johnson*, 515 U.S. 900, ——, 115 S. Ct. 2475, 2493, 132 L.Ed.2d 762 (1995) (noting the "federalism costs exacted by § 5 preclearance").

Appellants nevertheless contend that we should adopt their reading of § 5 because it is supported by our decision in *Beer*, by the Attorney General's regulations, and by considerations of public policy. In *Beer*, we held that § 5 prohibited only retrogressive effects and further observed that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S. at 141, 96 S. Ct. at 1364. Al-



though there had been no allegation that the redistricting plan in *Beer* "so . . . discriminate[d] on the basis of race or color as to be unconstitutional," we cited in *dicta* a few cases to illustrate when a redistricting plan might be found to be constitutionally offensive. *Id.* at 142, n. 14, 96 S. Ct. at 1364, n. 14. Among them was our decision in *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L.Ed.2d 314 (1973), in which we sustained a vote dilution challenge, brought under the Equal Protection Clause, to the use of multimember election districts in two Texas counties. *Ibid.* Appellants argue that "[b]ecause vote dilution standards under the Constitution and Section 2 were generally coextensive at the time *Beer* was decided, *Beer*'s discussion meant that practices that violated Section 2 would not be entitled to preclearance under Section 5." Brief for Federal Appellant 36-37.

Even assuming, *arguendo*, that appellants' argument had some support in 1976, it is no longer valid today because the applicable statutory and constitutional standards have changed. Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the state or political subdivision acted with a discriminatory purpose. See *City of Mobile v. Bolden*, 446 U.S. 55, 62, 100 S. Ct. 1490, 1497, 64 L.Ed.2d 47 (1980) (plurality opinion) ("Our decisions . . . have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose"); *id.* at 66, 100 S. Ct. at 1499 ("[O]nly if there is purposeful discrimination can there be a violation of the Equal

Protection Clause of the Fourteenth Amendment"); see also *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 563, 50 L.Ed.2d 450 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"). When Congress amended § 2 in 1982, it clearly expressed its desire that § 2 *not* have an intent component, see S. Rep. No. 97-417, at 2, U.S. Code Cong. & Admin. News 1982 pp. 177, 178 ("Th[e 1982] amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2"). Because now the Constitution requires a showing of intent that § 2 does not, a violation of § 2 is no longer *a fortiori* a violation of the Constitution. Congress itself has acknowledged this fact. See *id.* at 39 ("The Voting Rights Act is the best example of Congress' power to enact implementing legislation that goes beyond the direct prohibitions of the Constitution itself").

Justice STEVENS argues that the subsequent divergence of constitutional and statutory standards is of no moment because, in his view, we "did not [in *Beer*] purport to distinguish between challenges brought under the Constitution and those brought under the [Voting Rights] statute." *Post*, at 1510 (opinion dissenting in part and concurring in part). Our citation to *White*, he posits, incorporated *White*'s standard into our exception for nonretrogressive apportionments that violate § 5, whether or not that standard continued to coincide with the constitutional standard. In essence, Justice STEVENS reads *Beer* as creating an exception for nonretrogressive apportionments that so discriminate on the basis of race or



color as to violate any federal law that happens to coincide with what would have amounted to a constitutional violation in 1976. But this reading flatly contradicts the plain language of the exception we recognized, which applies solely to apportionments that "so discriminat[e] on the basis of race or color as to violate the Constitution." *Beer*, *supra*, at 141, 96 S. Ct. at 1364 (emphasis added). We cited *White*, not for itself, but because it embodied the current constitutional standard for a violation of the Equal Protection Clause. See also *id.* at 142, n. 14, 96 S. Ct. at 1364, n. 14 (noting that New Orleans' plan did "not remotely approach a violation of the *constitutional* standards enunciated in" *White* and other cited cases) (emphasis added). When *White* ceased to represent the current understanding of the Constitution, a violation of its standard—even though that standard was later incorporated in § 2—no longer constituted grounds for denial of preclearance under *Beer*.

Appellants' next claim is that we must defer to the Attorney General's regulations interpreting the Act, one of which states:

> "In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance." 28 C.F.R. § 51.55(b)(2) (1996).

Although we normally accord the Attorney General's construction of the Voting Rights Act great defer-

ence, "we only do so if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508, 112 S. Ct. 820, 831, 117 L.Ed.2d 51 (1992). Given our longstanding interpretation of § 5, see *supra*, at 1496-1498, 1498-1500, which Congress has declined to alter by amending the language of § 5, *Arkansas Best Corp. v. Commissioner*, 485 U.S. 212, 222, n. 7, 108 S. Ct. 971, 977, n. 7, 99 L.Ed.2d 183 (1988) (placing some weight on Congress' failure to express disfavor with our 25-year interpretation of a tax statute), we believe Congress has made it sufficiently clear that a violation of § 2 is not grounds in and of itself for denying preclearance under § 5. That there may be some suggestion to the contrary in the Senate Report to the 1982 Voting Rights Act amendments, S. Rep. No. 97-417, *supra*, at 12, n. 31, U.S. Code Cong. & Admin. News 1982 pp. 177, 189, does not change our view. With those amendments, Congress, among other things, renewed § 5 but did so without changing its applicable standard. We doubt that Congress would depart from the settled interpretation of § 5 and impose a demonstrably greater burden on the jurisdictions covered by § 5, see *supra*, at 1498, by dropping a footnote in a Senate Report instead of amending the statute itself. See *Pierce v. Underwood*, 487 U.S. 552, 567, 108 S. Ct. 2541, 2551, 101 L.Ed.2d 490 (1988) ("Quite obviously, reenacting precisely the same language would be a strange way to make a change"). See also *City of Lockhart*, 460 U.S. 125, 103 S. Ct. 998, 74 L.Ed.2d 863 (1983) (reaching its holding over Justice Marshall's dissent, which raised the argument now advanced by appellants regarding this passage in the Senate Report).



Nor does the portion of the House Report cited by Justice STEVENS unambiguously call for the incorporation of § 2 into § 5. That portion of the Report states

> "many voting and election practices currently in effect are outside the scope of [§ 5] . . . because they were in existence before 1965. . . . Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation [under § 2] or preclearance [under § 5]." H.R. Rep. No. 97-227, p. 28 (1981).

The obvious thrust of this passage is to establish that pre-1965 discriminatory practices are not free from scrutiny under the Voting Rights Act just because they need not be precleared under § 5: Such practices might still violate § 2. But to say that pre-1965 practices can be reached solely by § 2 is not to say that all post-1965 changes that might violate § 2 may be reached by both § 2 *and* § 5 or that "the substantive standards for § 2 and § 5 [are] the same," see *post*, at 1511 (opinion dissenting in part and concurring in part). Our ultimate conclusion is also not undercut by statements found in the "postenactment legislative record," see *post*, at 1511, n. 9, given that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313, 80 S. Ct. 326, 332, 4 L.Ed.2d 334 (1960). We therefore decline to give these sources controlling weight.

Appellants' final appeal is to notions of public policy. They assert that if the district court or Attorney General examined whether a covered jurisdiction's redistricting plan violates § 2 at the same time it ruled on preclearance under § 5, there would be no need for two separate actions and judicial resources would be conserved. Appellants are undoubtedly correct that adopting their interpretation of § 5 would serve judicial economy in those cases where a § 2 challenge follows a § 5 proceeding. But this does not always happen, and the burden on judicial resources might actually increase if appellants' position prevailed because § 2 litigation would effectively be incorporated into *every* § 5 proceeding.

Appellants lastly argue that preclearance is an equitable remedy, obtained through a declaratory judgment action in the district court, see 42 U.S.C. § 1973c, or through the exercise of the Attorney General's discretion, see 28 C.F.R. § 51.52(a) (1996). A finding that a redistricting plan violates § 2 of the Act, they contend, is an equitable "defense," on the basis of which a decisionmaker should, in the exercise of its equitable discretion, be free to deny preclearance. This argument, however, is an attempt to obtain through equity that which the law—*i.e.*, the settled interpretation of § 5—forbids. Because "it is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law,'" *INS v. Pangilinan*, 486 U.S. 875, 883, 108 S. Ct. 2210, 2216, 100 L.Ed.2d 882 (1988) (citing *Hedges v. Dixon County*, 150 U.S. 182, 192, 14 S. Ct. 71, 74-75, 37 L.Ed. 1044 (1893)), this argument must fail.



Of course, the Attorney General or a private plaintiff remains free to initiate a § 2 proceeding if either believes that a jurisdiction's newly enacted voting "qualification, prerequisite, standard, practice, or procedure" may violate that section. All we hold today is that preclearance under § 5 may not be denied on that basis alone.

## III

Appellants next contend that evidence showing that a jurisdiction's redistricting plan dilutes the voting power of minorities, see *supra*, at 1498, is at least *relevant* in a § 5 proceeding because it tends to prove that the jurisdiction enacted its plan with a discriminatory "purpose." The district court, reasoning that "[t]he line [between § 2 and § 5] cannot be blurred by allowing a defendant to do indirectly what it cannot do directly," 907 F. Supp. at 445, rejected this argument and held that it "will not permit section 2 evidence to prove discriminatory purpose under section 5." *Ibid.* Because we hold that some of this "§ 2 evidence" may be relevant to establish a jurisdiction's "intent to retrogress" and cannot say with confidence that the district court considered the evidence proffered to show that the Board's reapportionment plan was dilutive, we vacate this aspect of the district court's holding and remand. In light of this conclusion, we leave open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent. See *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 465, n. 5, 109 S. Ct. 1904, 1911, n. 5, 104 L.Ed.2d 506 (1989) (declining to decide an issue that "is not necessary to our decision"). Reserving this question is

particularly appropriate when, as in this case, it was not squarely addressed by the decision below or in the parties' briefs on appeal. See Brief for Federal Appellant 23; Brief for Appellant Price et. al. 31-33, 34-35; Brief for Appellee 42-43. But in doing so, we do not, contrary to Justice STEVENS' view, see *post*, at 1508 (opinion dissenting in part and concurring in part), necessarily assume that the Board enacted the Jury plan with some non-retrogressive, but nevertheless discriminatory, "purpose." The existence of such a purpose, and its relevance to § 5, are issues to be decided on remand.

Although § 5 warrants a denial of preclearance if a covered jurisdiction's voting change "ha[s] the purpose [or] . . . the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. § 1973c, we have consistently interpreted this language in light of the purpose underlying § 5—"to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities." *Beer*, 425 U.S. at 141, 96 S. Ct. at 1364. Accordingly, we have adhered to the view that the only "effect" that violates § 5 is a retrogressive one. *Beer*, 425 U.S. at 141, 96 S. Ct. at 1363-1364; *City of Lockhart*, 460 U.S. at 134, 103 S. Ct. at 1004.

Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rule Evid. 401. As we observed in *Arlington Heights*, 429 U.S. at 266, 97 S. Ct. at 563-564, the impact of an official action is often probative of why the



action was taken in the first place since people usually intend the natural consequences of their actions. Thus, a jurisdiction that enacts a plan having a dilutive impact is more likely to have acted with a discriminatory intent to dilute minority voting strength than a jurisdiction whose plan has no such impact. A jurisdiction that acts with an intent to dilute minority voting strength is more likely to act with an intent to worsen the position of minority voters—*i.e.*, an intent to retrogress—than a jurisdiction acting with no intent to dilute. The fact that a plan has a dilutive impact therefore makes it "more probable" that the jurisdiction adopting that plan acted with an intent to retrogress than "it would be without the evidence." To be sure, the link between dilutive impact and intent to retrogress is far from direct, but "the basic standard of relevance . . . is a liberal one," *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587, 113 S. Ct. 2786, 2794, 125 L.Ed.2d 469 (1993), and one we think is met here.

That evidence of a plan's dilutive impact may be relevant to the § 5 purpose inquiry does not, of course, mean that such evidence is dispositive of that inquiry. In fact, we have previously observed that a jurisdiction's single decision to choose a redistricting plan that has a dilutive impact does not, without more, suffice to establish that the jurisdiction acted with a discriminatory purpose. *Shaw v. Hunt*, 517 U.S. ——, ——, n. 6, 116 S. Ct. 1894, 1904, n. 6, 135 L.Ed.2d 207 (1996) ("[W]e doubt that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory purpose under § 5"). This is true whether the jurisdiction chose the more dilutive plan because it better comported with its traditional

districting principles, see *Miller v. Johnson*, 515 U.S. at ——, 115 S. Ct. at 2491-2492 (rejecting argument that a jurisdiction's failure to adopt the plan with the greatest possible number of majority black districts establishes that it acted with a discriminatory purpose); *Shaw*, *supra*, at —— - ——, 116 S. Ct. at 1903-1904 (same), or if it chose the plan for no reason at all. Indeed, if a plan's dilutive impact were dispositive, we would effectively incorporate § 2 into § 5, which is a result we find unsatisfactory no matter how it is packaged. See Part II, *supra*.

As our discussion illustrates, assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a "sensitive inquiry into such circumstantial and direct evidence as may be available." *Arlington Heights*, 429 U.S. at 266, 97 S. Ct. at 564. In conducting this inquiry, courts should look to our decision in *Arlington Heights* for guidance. There, we set forth a framework for analyzing "whether invidious discriminatory purpose was a motivating factor" in a government body's decisionmaking. *Ibid.* In addition to serving as the framework for examining discriminatory purpose in cases brought under the Equal Protection Clause for over two decades, see, *e.g.*, *Shaw v. Reno*, 509 U.S. 630, 644, 113 S. Ct. 2816, 2825, 125 L.Ed.2d 511 (1993) (citing *Arlington Heights* standard in context of Equal Protection Clause challenge to racial gerrymander of districts); *Rogers v. Lodge*, 458 U.S. 613, 618, 102 S. Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982) (evaluating vote dilution claim under Equal Protection Clause using *Arlington Heights* test); *Mobile*, 446 U.S. at 70-74, 100 S. Ct. at 1501-1503 (same), the *Arlington Heights* framework has also been used, at least in part, to evaluate purpose in our previous § 5 cases. See *Pleasant Grove*, 479 U.S. at 469-470, 107 S. Ct. at 798-799 (considering city's history in rejecting annexation of black neighborhoods and its departure from normal procedures when calculating costs of annexation alternatives); see also *Busbee v. Smith*, 549 F. Supp. 494, 516-517 (D.D.C. 1982), *summarily aff'd*, 459 U.S. 1166, 103 S. Ct. 809, 74 L.Ed.2d 1010 (1983) (referring to *Arlington Heights* test); *Port Arthur v. United States*, 517 F. Supp. 987, 1019, *aff'd*, 459 U.S. 159, 103 S. Ct. 530, 74 L.Ed.2d 334 (1982) (same).



The "important starting point" for assessing discriminatory intent under *Arlington Heights* is "the impact of the official action whether it 'bears more heavily on one race than another.'" 429 U.S. at 266, 97 S. Ct. at 564 (citing *Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 2048-2049, 48 L.Ed.2d 597 (1976)). In a § 5 case, "impact" might include a plan's retrogressive effect and, for the reasons discussed above, its dilutive impact. Other considerations relevant to the purpose inquiry include, among other things, "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body." *Id.* at 268, 97 S. Ct. at 565.

We are unable to determine from the District Court's opinion in this case whether it deemed irrelevant all evidence of the dilutive impact of the redistricting plan adopted by the Board. At one point,

the District Court correctly stated that "the adoption of one nonretrogressive plan rather than another nonretrogressive plan that contains more majority-black districts cannot *by itself* give rise to the inference of discriminatory intent." 907 F. Supp., at 450 (emphasis added). This passage implies that the District Court believed that the existence of less dilutive options was at least relevant to, though not dispositive of, its purpose inquiry. While this language is consistent with our holding today, see *supra*, at 1501-1502, the District Court also declared that "we will not permit section 2 evidence to prove discriminatory purpose under section 5." *Ibid.* With this statement, the District Court appears to endorse the notion that evidence of dilutive impact is irrelevant even to an inquiry into retrogressive intent, a notion we reject. See *supra*, at 1501-1502.

The Board contends that the District Court actually "presumed that white majority districts had [a dilutive] effect," Brief for Appellee 35, and "cut directly to the dispositive question 'started' by the existence of [a dilutive] impact: did the Board have 'legitimate, nondiscriminatory motives' for adopting its plan[?]" *Id.* at 33. Even if the Board were correct, the District Court gave no indication that it was assuming the plan's dilutive effect, and we hesitate to attribute to the District Court a rationale it might not have employed. Because we are not satisfied that the District Court considered evidence of the dilutive impact of the Board's redistricting plan, we vacate this aspect of the District Court's opinion. The District Court will have the opportunity to apply the *Arlington Heights* test on remand as well as to address appellants' additional arguments that it erred



in refusing to consider evidence that the Board was in violation of an ongoing injunction "to 'remedy any remaining vestiges of [a] dual [school] system'," 907 F. Supp., at 449, n. 18.

* * * * *

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this decision.

*It is so ordered.*

Justice THOMAS, concurring.

Although I continue to adhere to the views I expressed in *Holder v. Hall*, 512 U.S. 874, 891, 114 S. Ct. 2581, 2591, 129 L.Ed.2d 687 (1994) (opinion concurring in judgment), I join today's opinion because it is consistent with our vote dilution precedents. I fully anticipate, however, that as a result of today's holding, all of the problems we have experienced in § 2 vote dilution cases will now be replicated and, indeed, exacerbated in the § 5 retrogression inquiry.

I have trouble, for example, imagining a reapportionment change that could not be deemed "retrogressive" under our vote dilution jurisprudence by a court inclined to find it so. We have held that a reapportionment plan that "enhances the position of racial minorities" by increasing the number of majority-minority districts does not "have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5." *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). But in so holding we studiously avoided addressing one of the necessary consequences of increasing majority-minority districts: Such action *necessarily decreases* the level of minority influence in surrounding districts, and to that extent "dilutes" the vote of minority voters in those other districts, and perhaps dilutes the influence of the minority group as a whole. See, *e.g.*, *Hays v. Louisiana*, 936 F. Supp. 360, 364, n. 17 (W.D. La. 1996) (three-judge court) (noting that plaintiffs' expert "argues convincingly that our plan, with its one black majority and three influence districts, empowers more black voters statewide than does" a plan with



two black-majority districts and five "bleached" districts in which minority influence was reduced in order to create the second black-majority district); cf. *Johnson v. De Grandy*, 512 U.S. 997, 1007, 114 S. Ct. 2647, 2655, 129 L.Ed.2d 775 (1994) (noting that dilution can occur by "fragmenting the minority voters among several districts . . . or by packing them into one or a small number of districts to minimize their influence in the districts next door").

Under our vote dilution jurisprudence, therefore, a court could strike down *any* reapportionment plan, either because it did not include enough majority-minority districts or because it did (and thereby diluted the minority vote in the remaining districts). A court could presumably even strike down a new reapportionment plan that did not significantly alter the status quo at all, on the theory that such a plan did not measure up to some hypothetical ideal. With such an indeterminate "rule," § 5 ceases to be primarily a prophylactic tool in the important war against discrimination in voting, and instead becomes the means whereby the Federal Government, and particularly the Department of Justice, usurps the legitimate political judgments of the States. And such an empty "rule" inevitably forces the courts to make political judgments regarding which type of apportionment best serves supposed minority interests—judgments that the courts are ill-equipped to make.

I can at least find some solace in the belief that today's opinion will force us to confront, with a renewed sense of urgency, this fundamental incon-

sistency that lies at the heart of our vote dilution jurisprudence.

Beyond my general objection to our vote dilution precedent, the one portion of the majority opinion with which I disagree is the majority's new suggestion that preclearance standards established by the Department of Justice are "normally" entitled to deference. See *ante*, at 1499.* Section 5 sets up alternative routes for preclearance, and the primary route specified is through the District Court for the District of Columbia, not through the Attorney General's office. See 42 U.S.C. § 1973c (generally requiring District Court preclearance, with a proviso that covered jurisdictions may *obtain* preclearance by the Attorney General in lieu of the District Court preclearance, but providing no authority for the Attorney General to *preclude* judicial preclearance). Requiring the District Court to defer to adverse preclearance decisions by the Attorney General based upon the very preclearance standards she articulates would essentially render the independence of the District Court preclearance route a nullity.

Moreover, given our own "longstanding interpretation of § 5," see *ante*, at 1499, deference to the particular preclearance regulation addressed in this case would be inconsistent with another of the

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* I do not address the separate question, not presented by this case, whether the Department's *interpretation* of the Voting Rights Act, as opposed to its articulation of standards applicable to its own preclearance determinations, is entitled to deference. The regulation at issue here only purports to be the latter.



Attorney General's regulations, which provides: "In making determinations [under § 5] the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal courts." 28 C.F.R. § 51.56 (1996). Thus, while I agree with the majority's decision not to defer to the Attorney General's standards, I would reach that result on different grounds.

Justice BREYER, with whom Justice GINSBURG joins, concurring in part and concurring in the judgment.

I join Parts I and II of the majority opinion, and Part III insofar as it is not inconsistent with this opinion. I write separately to express my disagreement with one aspect of the majority opinion. The majority says that we need not decide "whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." *Ante*, at 1501. In my view, we should decide the question, for otherwise the District Court will find it difficult to evaluate the evidence that we say it must consider. Cf. *post*, at 1512 (STEVENS, J., dissenting in part and concurring in part). Moreover, the answer to the question is that the "purpose" inquiry does extend beyond the search for retrogressive intent. It includes the purpose of unconstitutionally diluting minority voting strength.

The language of § 5 itself forbids a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" where that change either (1) has the "purpose" or (2) will have the "effect" of "denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. These last few words reiterate in context the language of the 15th Amendment itself: "The right of citizens . . . to vote shall not be denied or abridged . . . on account of race [or] color. . . ." This use of constitutional language indicates that one purpose forbidden by the statute is a purpose to act unconstitutionally. And a new plan enacted with the purpose of unconstitutionally diluting minority votes is an unconstitutional plan. *Mobile v. Bolden*, 446 U.S. 55, 62-63, 66, 100 S. Ct. 1490, 1497-1498, 1499, 64 L.Ed.2d 47 (1980) (plurality opinion); *ante*, at 1499.



Of course, the constitutional language also applies to § 5's prohibition that rests upon "effects." The Court assumes, in its discussion of "effects," that the § 5 word "effects" does not now embody a *purely* constitutional test, whether or not it ever did so. See *ante*, at 1497-1498; *City of Rome v. United States*, 446 U.S. 156, 173, 177, 100 S. Ct. 1548, 1559-1560, 64 L.Ed.2d 119 (1980). And that fact, here, is beside the point. The separate argument about the meaning of the word "effect" concerns *how far beyond* the Constitution's requirements Congress intended that word to reach. The argument about "purpose" is simply whether Congress intended the word to reach *as far as* the Constitution itself, embodying those purposes that, in relevant context, the Constitution itself would forbid. I can find nothing in the Court's discussion that shows that Congress intended to restrict the meaning of the statutory word "purpose" short of what the Constitution itself requires. And the Court has previously expressly indicated that minority vote dilution is a harm that § 5 guards against. *Allen v. State Bd. of Elections*, 393 U.S. 544, 569, 89 S. Ct. 817, 833-834, 22 L.Ed.2d 1 (1969).

Consider a hypothetical example that will clarify the precise legal question here at issue. Suppose that a covered jurisdiction is choosing between two new voting plans, A and B. Neither plan is retrogressive. Plan A violates every traditional districting principle, but from the perspective of minority representation, it maintains the status quo, thereby meeting the "effects" test of § 5. See *ante*, at 1497-1498.

Plan B is basically consistent with traditional districting principles and it also creates one or two new majority-minority districts (in a state where the number of such districts is significantly less than proportional to minority voting age population). Suppose further that the covered jurisdiction adopts Plan A. Without any other proposed evidence or justification, ordinary principles of logic and human experience suggest that the jurisdiction would likely have adopted Plan A with "the purpose . . . of denying or abridging the right to vote on account of race or color." § 1973c. It is reasonable to assume that the Constitution would forbid the use of such a plan. See *Rogers v. Lodge*, 458 U.S. 613, 617, 102 S. Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982) (Fourteenth Amendment covers vote dilution claims); *Mobile*, *supra*, at 66, 100 S. Ct. at 1499 (plurality opinion) (same). And compare *id.* at 62-63, 100 S. Ct. at 1497-1498 (intentional vote dilution may be illegal under the Fifteenth Amendment), and *Gomillion v. Lightfoot*, 364 U.S. 339, 346, 81 S. Ct. 125, 129-130, 5 L.Ed.2d 110 (1960) (Fifteenth Amendment covers municipal boundaries drawn to exclude blacks), with *Mobile*, *supra*, at 84, n. 3, 100 S. Ct. at 1509, n. 3 (STEVENS, J., concurring in judgment) (*Mobile* plurality said that Fifteenth Amendment does not reach vote dilution); *Voinovich v. Quilter*, 507 U.S. 146, 159, 113 S. Ct. 1149, 1158, 122 L.Ed.2d 500 (1993) ("This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims . . ."); *Shaw v. Reno*, 509 U.S. 630, 645, 113 S. Ct. 2816, 2825-2826, 125 L.Ed.2d 511 (1993) (endorsing the *Gomillion* concurrence's Fourteenth Amendment approach); *Beer v. United States*, 425 U.S. 130, 142, n. 14, 96 S. Ct. 1357, 1364, n. 14, 47 L.Ed.2d 629 (1976). Then, to read § 5's "purpose"



language to require approval of Plan A, even though the jurisdiction cannot provide a neutral explanation for its choice, would be both to read § 5 contrary to its plain language and also to believe that Congress would have wanted a § 5 court (or the Attorney General) to approve an unconstitutional plan adopted with an unconstitutional purpose.

In light of this example, it is not surprising that this Court has previously indicated that the purpose part of § 5 prohibits a plan adopted with the purpose of unconstitutionally diluting minority voting strength, whether or not the plan is retrogressive in its effect. In *Shaw v. Hunt*, for example, the Court doubted "that a showing of discriminatory effect under § 2, *alone*, could support a claim of discriminatory purpose under § 5." 517 U.S. ——, n. 6, 116 S. Ct. at 1904, n. 6 (1996) (emphasis added). The word "alone" suggests that the evidence of a discriminatory effect there at issue—evidence of dilution—could be relevant to a discriminatory purpose claim. And if so, the more natural understanding of § 5 is that an unlawful purpose includes more than simply a purpose to retrogress. Otherwise, dilution would either dispositively show an unlawful discriminatory effect (if retrogressive) or it would almost always be irrelevant (if not retrogressive). Either way, it would not normally have much to do with unlawful purpose. See also the discussions in *Richmond v. United States*, 422 U.S. 358, 378-379, 95 S. Ct. 2296, 2307-2308, 45 L.Ed.2d 245 (1975) (annexation plan did not have an impermissible dilutive effect but the Court remanded for a determination of whether there was an impermissible § 5 purpose); *Pleasant Grove v. United States*, 479 U.S. 462, 471-472, and n. 11, 107 S. Ct. 794,

800, and n. 11, 93 L.Ed.2d 866 (1987) (purpose to minimize *future* black voting strength is impermissible under § 5); *Port Arthur v. United States*, 459 U.S. 159, 168, 103 S. Ct. 530, 536, 74 L.Ed.2d 334 (1982) (a plan adopted for a discriminatory purpose is invalid under § 5 even if it "might otherwise be said to reflect the political strength of the minority community"); *post*, at 1512 (STEVENS, J., dissenting in part and concurring in part).

*Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475, 132 L.Ed.2d 762 (1995), also implicitly assumed that § 5's "purpose" stretched beyond the purely retrogressive. There, the Justice Department pointed out that Georgia made a choice between two redistricting plans, one of which (call it Plan A) had more majority-black districts than the other (call it Plan B). The Department argued that the fact that Georgia chose Plan B showed a forbidden § 5 discriminatory purpose. The Court rejected this argument, but the reason that the majority gave for that rejection is important. The Court pointed out that Plan B embodied traditional state districting principles. It reasoned that "[t]he State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference" of an unlawful discriminatory purpose. *Id.* at ——, 115 S. Ct. at 2492. If the only relevant "purpose" were a retrogressive purpose, this reasoning, with its reliance upon traditional districting principles, would have been beside the point. The Court would have concerned itself only with Georgia's intent to worsen the position of minorities, not with the reasons why Georgia could have adopted one of two potentially ameliorative plans. Indeed, the



Court indicated that an ameliorative plan *would* run afoul of the § 5 purpose test if it violated the Constitution. *Ibid.* See also *Shaw v. Hunt*, *supra*, at ——- - ——, 116 S. Ct. at 1903-1904.

In sum, the Court today should make explicit an assumption implicit in its prior cases. Section 5 prohibits a covered state from making changes in its voting practices and procedures where those changes have the *unconstitutional* "purpose" of unconstitutionally diluting minority voting strength.

Justice STEVENS, with whom Justice SOUTER joins, dissenting in part and concurring in part.

In my view, a plan that clearly violates § 2 is not entitled to preclearance under § 5 of the Voting Rights Act of 1965. The majority's contrary view would allow the Attorney General of the United States to place her stamp of approval on a state action that is in clear violation of federal law. It would be astonishing if Congress had commanded her to do so. In fact, however, Congress issued no such command. Surely no such command can be found in the text of § 5 of the Voting Rights Act.[1] Moreover, a fair

[1] As originally enacted, § 5 provided:

"Sec. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the



review of the text and the legislative history of the 1982 amendment to § 2 of that Act indicates that Congress intended the Attorney General to deny preclearance under § 5 whenever it was clear that a new voting practice was prohibited by § 2. This does not mean that she must make an independent inquiry into possible violations of § 2 whenever a request for preclearance is made. It simply means that, as her regulations provide, she must refuse preclearance when "necessary to prevent a clear violation of amended section 2." 28 C.F.R. § 51.55(b)(2) (1996).

It is, of course, well settled that the Attorney General must refuse to preclear a new election procedure in a covered jurisdiction if it will "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). A retrogressive effect or a retrogressive purpose is a sufficient basis for denying a preclearance request under § 5. Today, however, the Court holds that retrogression is the only kind of effect that will justify denial of preclearance under § 5, *ante*, at 1496-1501, and it assumes that "the § 5 purpose inquiry [never] extends beyond the search for

Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code [28 USCS § 2284] and any appeal shall lie to the Supreme Court." 79 Stat. 439.

retrogressive intent." *Ante*, at ——. While I agree that this action must be remanded even under the Court's miserly interpretation of § 5, I disagree with the Court's holding/assumption that § 5 is concerned only with retrogressive effects and purposes.

Before explaining my disagreement with the Court, I think it important to emphasize the three factual predicates that underlie our analysis of the issues. First, we assume that the plan submitted by the Board was not "retrogressive" because it did not make matters any worse than they had been in the past. None of the 12 districts had ever had a black majority and a black person had never been elected to the Bossier Parish School Board (Board). App. to Juris. Statement 67a. Second, because the majority in both the District Court and this Court found that even clear violations of § 2 must be precleared and thus found it unnecessary to discuss whether § 2 was violated in this action, we may assume that the record discloses a "clear violation" of § 2. This means that, in the language of § 2, it is perfectly clear that "the political processes leading to nomination or election [to positions on the Board] are not equally open to participation by members of [the African-American race] in that its members have less opportunity than other members of the electorate to . . . elect representatives of their choice." 42 U.S.C. § 1973(b).[2]

[2] Although the majority in the District Court refused to consider any of the evidence relevant to a § 2 violation, the parties' stipulations suggest that the plan violated § 2. For instance, the parties' stipulated that there had been a long history of discrimination against black voters in Bossier Parish, see App. to Juris. Statement 130a-140a; that voting in Bossier Parish was racially polarized, see *id.*, at 122a-127a; and that it



Third, if the Court is correct in assuming that the purpose inquiry under § 5 may be limited to evidence of "retrogressive intent," it must also be willing to assume that the documents submitted in support of the request for preclearance clearly establish that the plan was adopted for the specific purpose of preventing African-Americans from obtaining representation on the Board. Indeed, for the purpose of analyzing the legal issues, we must assume that Judge Kessler, concurring in part and dissenting in part, accurately summarized the evidence when she wrote:

> "The evidence in this case demonstrates overwhelmingly that the School Board's decision to adopt the Police Jury redistricting plan was motivated by discriminatory purpose. The adoption of the Police Jury plan bears heavily on the black community because it denies its members a reasonable opportunity to elect a candidate of their choice. The history of discrimination by the Bossier School System and the Parish itself demonstrates the Board's continued refusal to address the concerns of the black community in Bossier Parish. The sequence of events leading up to the adoption of the plan illustrate the Board's discriminatory purpose. The School Board's substantive departures from traditional districting principles is similarly probative of discriminatory motive. Three School Board members have acknowledged that the Board

was possible to draw two majority black districts without violating traditional districting principles, see *id.* at 76a, 82a-83a, 114a-115a.

is hostile to black representation. Moreover, some of the purported rationales for the School Board's decision are flat-out untrue, and others are so glaringly inconsistent with the facts of the case that they are obviously pretexts." 907 F. Supp. 434, 463 (D.D.C. 1995).

If the purpose and the effect of the Board's plan were simply to maintain the discriminatory status quo as described by Judge Kessler, the plan would not have been retrogressive. But, as I discuss below, that is not a sufficient reason for concluding that it complied with § 5.

## I

In the Voting Rights Act of 1965, Congress enacted a complex scheme of remedies for racial discrimination in voting. As originally enacted, § 2 of the Act was "an uncontroversial provision" that "simply restated" the prohibitions against such discrimination "already contained in the Fifteenth Amendment," *Mobile v. Bolden*, 446 U.S. 55, 61, 100 S. Ct. at 1496-1497 (1980) (plurality opinion). Like the constitutional prohibitions against discriminatory districting practices that were invalidated in cases like *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L.Ed.2d 110 (1960), and *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L.Ed.2d 314 (1973), § 2 was made applicable to every State and political subdivision in the country. Section 5, on the other hand, was highly controversial because it imposed novel, extraordinary remedies in certain areas where discrimination had been most flagrant. See *South Carolina v. Katzen-*



*bach*, 383 U.S. 301, 334-335, 86 S. Ct. 803, 821-822, 15 L.Ed.2d 769 (1966).[3] Jurisdictions like Bossier Parish in Louisiana are covered by § 5 because their history of discrimination against African-Americans was a matter of special concern to Congress. Because these jurisdictions had resorted to various strategies to avoid complying with court orders to remedy discrimination, "Congress had reason to suppose that [they] might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Id.* at 335, 86 S. Ct. at 822. Thus Congress enacted § 5, not to maintain the discriminatory status quo, but to stay ahead of efforts by the most resistant jurisdictions to undermine the Act's purpose of "rid[ding] the country of racial discrimination." *Id.* at 315, 86 S. Ct. at 812 ("The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant").

In areas of the country lacking a history of pervasive discrimination, Congress presumed that voting practices were generally lawful. Accordingly, the burden of proving a violation of § 2 has always rested on the party challenging the voting practice. The situation is dramatically different in covered jurisdictions. In those jurisdictions, § 5 flatly prohibits the adoption of any new voting procedure unless the State or political subdivision institutes an action in the Federal District Court for the District of Columbia

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[3] Section 4 of the Act sets forth the formula for identifying the jurisdictions in which such discrimination had occurred, see *South Carolina v. Katzenbach*, 383 U.S. at 317-318, 86 S. Ct. at 812-813.

and obtains a declaratory judgment that the change will not have a discriminatory purpose or effect. See 42 U.S.C. § 1973c. The burden of proving compliance with the Act rests on the jurisdiction. A proviso to § 5 gives the Attorney General the authority to allow the new procedure to go into effect, but like the immigration statutes that give her broad discretion to waive deportation of undesirable aliens, it does not expressly impose any limit on her discretion to refuse preclearance. See *ibid.* The Attorney General's discretion is, however, cabined by regulations that are presumptively valid if they "are reasonable and do not conflict with the Voting Rights Act itself," *Georgia v. United States*, 411 U.S. 526, 536, 93 S. Ct. 1702, 1708, 36 L.Ed.2d 472 (1973). Those regulations provide that preclearance will generally be granted if a proposed change "is free of discriminatory purpose and retrogressive effect"; they also provide, however, that in "those instances" in which the Attorney General concludes "that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2," preclearance shall be withheld.[4]

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[4] Title 28 C.F.R. § 51.55 (1996) provides:

"Consistency with constitutional and statutory requirements.

"(a) *Consideration in general.* In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b), sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.

"(b) *Section 2.* (1) Preclearance under section 5 of a voting change will not preclude any legal action under section 2 by the Attorney General if implementation of the change subsequently demonstrates that such action is appropriate.

"(2) In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold section 5 preclearance."



There is no basis for the Court's speculation that litigants would so "'routinely,'" *ante*, at 1497, employ this 10-year old regulation as to "make compliance with § 5 contingent upon compliance with § 2." *Ante*, at 1497. Nor do the regulations require the jurisdiction to assume the burden of proving the absence of vote dilution, see *ante*, at ——— - ———. They merely preclude preclearance when "necessary to prevent a clear violation of . . . section 2." While the burden of disproving discriminatory purpose or retrogressive effect is on the submitting jurisdiction, if the Attorney General's conclusion that the change would clearly violate § 2 is challenged, the burden on that issue, as in any § 2 challenge, should rest on the Attorney General.[5]

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[5] Thus, I agree with those courts that have found that the jurisdiction is not required to prove that its proposed change will not violate § 2 in order to receive preclearance. See *Arizona v. Reno*, 887 F. Supp. 318, 321 (D.D.C. 1995). Although several three-judge district courts have concluded that § 2 standards should not be incorporated into § 5, none has held that preclearance should be granted when there is a clear

The Court does not suggest that this regulation is inconsistent with the text of § 5. Nor would this be persuasive, since the language of § 5 forbids preclearance of any voting practice that would have "the purpose [or] effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Instead the Court rests its entire analysis on the flawed premise that our cases hold that a change, even if otherwise unlawful, cannot have an effect prohibited by § 5 unless that effect is retrogressive. The two cases on which the Court relies, *Beer v. United States*, 425 U.S. 130, 96 S. Ct. 1357, 47 L.Ed.2d 629 (1976), and *City of Lockhart v. United States*, 460 U.S. 125, 103 S. Ct. 998, 74 L.Ed.2d 863 (1983), do hold (as the current regulations provide) that proof that a change is not retrogressive is normally sufficient to justify preclearance under § 5. In neither case, however, was the Court confronted with the question whether that showing would be sufficient if the proposed change was so discriminatory that it clearly violated some other federal law. In fact, in *Beer*—which held that a legislative reapportionment enhancing the position of African-American voters did not have a discriminatory effect—the Court stated that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself

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violation of § 2; rather, they appear simply to have determined that a § 2 inquiry is not routinely required in a § 5 case. See, *e.g.*, *Georgia v. Reno*, 881 F. Supp. 7, 12-14 (D.D.C. 1995); *New York v. United States*, 874 F. Supp. 394, 398-399 (D.D.C. 1994); cf. *Burton v. Sheheen*, 793 F. Supp. 1329, 1350 (D.S.C. 1992) (holding that although courts are not "obligated to completely graft" § 2 standards onto § 5, "[i]t would be incongruous for the court to adopt a plan which did not comport with the standards and guidelines of § 2").



so discriminates on the basis of race or color as to violate the Constitution." 425 U.S. at 141, 96 S. Ct. at 1364.[6] Thus, to the extent that the *Beer* Court addressed the question at all, it suggested that certain nonretrogressive changes that were nevertheless discriminatory should not be precleared.

The Court discounts the significance of the "unless" clause because it refers to a constitutional violation rather than a statutory violation. According to the Court's reading, the *Beer* dictum at most precludes preclearance of changes that violate the Constitution rather than changes that violate § 2. This argument is unpersuasive. As the majority notes, the *Beer* Court cites *White v. Regester*, 412 U.S. at 766, 93 S. Ct. at 2339-2340, which found unconstitutional a reapportionment scheme that gave African-American residents "less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Because, in 1976, when *Beer* was decided, the § 2 standard was coextensive with the constitutional standard, *Beer* did not purport to distinguish between challenges brought under the Constitution and those brought under the statute. Rather *Beer*'s dictum suggests that any changes that violate the standard

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[6] In *Lockhart* the Court disavowed reliance on the ameliorative character of the change reviewed in *Beer*, see 460 U.S. at 134, n. 10, 103 S. Ct. at 1004, n. 10. It left open the question whether Congress had altered the *Beer* standard when it amended § 2 in 1982, *id.* at 133, n. 9, 103 S. Ct. at 1003, n. 9, and said nothing about the possible significance of a violation of a constitutional or statutory prohibition against vote dilution.

established in *White v. Regester* should not be precleared.[7]

As the Court recognizes, *ante*, at 1499, the law has changed in two respects since the announcement of the *Beer* dictum. In 1980, in what was perceived by Congress to be a change in the standard applied in *White v. Regester*, a plurality of this Court concluded that discriminatory purpose is an essential element of a constitutional vote dilution challenge. See *Mobile v. Bolden*, 446 U.S. 55, 62, 100 S. Ct. 1490, 1497 (1980). In reaction to that decision, in 1982 Congress amended § 2 by placing in the statute the language used in the *White* opinion to describe what is commonly known as the "results" standard for evaluating vote dilution challenges. See 96 Stat. 134 (now codified at 42 U.S.C. §§ 1973(a)-(b)); *Thornburg v. Gingles*, 478 U.S. 30, 35, 106 S. Ct. 2752, 2758, 92 L.Ed.2d 25 (1986).[8] Thus Congress preserved, as a matter of statutory law, the very same standard that the Court had identified in *Beer* as an exception to the general rule requiring preclearance of nonretrogressive changes. Because in 1975, *Beer* required denial of preclearance for voting plans that violated the *White* standard, it follows that Congress in

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[7] In response to this dissent, the majority contends that, at most, *Beer v. United States*, 425 U.S. 130, 96 S. Ct. 1357, 47 L.Ed.2d 629 (1976), allows denial of preclearance for those changes that violate the Constitution. See *ante*, at 1499-1500. Thus, the majority apparently concedes that our "settled interpretation," *ante*, at 1500, of § 5 supports a denial of preclearance for at least some nonretrogressive changes.

[8] The amended version of § 2 tracks the language in *White v. Regester*, 412 U.S. 755, 766, 93 S. Ct. 2332, 2339-2340, 37 L.Ed.2d 314 (1973).



preserving the *White* standard, intended also that the Attorney General should continue to refuse to preclear plans violating that standard.

That intent is confirmed by the legislative history of the 1982 Act. The Senate Report states:

> "Under the rule of *Beer v. United States*, 425 U.S. 130, 96 S. Ct. 1357, 47 L.Ed.2d 629 (1976), a voting change which is ameliorative is not objectionable unless the change 'itself so discriminates on the basis of race or color as to violate the Constitution.' 425 U.S. at 141 [96 S. Ct. at 1364]; see also 142 n. 14 [96 S. Ct. at 1364, n. 14] (citing to the dilution cases from *Fortson v. Dorsey* [379 U.S. 433, 85 S. Ct. 498, 13 L.Ed.2d 401 (1965),] through *White v. Regester*.). In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2." S. Rep. No. 97-417, p. 12, n. 31 (1982) U.S. Code Cong. & Admin. News 1982 pp. 177, 189.

The House Report conveys the same message in different language. It unequivocally states that whether a discriminatory practice or procedure was in existence before 1965 (and therefore only subject to attack under § 2), or is the product of a recent change (and therefore subject to preclearance under § 5) "affects only the mechanism that triggers relief." H.R. Rep. No. 97-227, p. 28 (1981). This statement plainly indicates that the Committee understood the substantive standards for § 2 and § 5 violations to be the same whenever a challenged practice in a covered jurisdiction represents a change subject to the dic-

tates of § 5.[9] Thus, it is reasonable to assume that Congress, by endorsing the "unless" clause in *Beer*, contemplated the denial of pre-clearance for any change that clearly violates amended § 2. The majority by belittling this legislative history, abrogates Congress' effort, in enacting the 1982 amendments, "to broaden the protection afforded by the Voting Rights Act." *Chisom v. Roemer*, 501 U.S. 380, 404, 111 S. Ct. 2354, 2368, 115 L.Ed.2d 348 (1991).

Despite this strong evidence of Congress' intent, the majority holds that no deference to the Attorney General's regulation is warranted. The Court

[9] The postenactment legislative record also supports the Attorney General's interpretation of § 5. In 1985, the Attorney General first proposed regulations requiring a denial of preclearance "based upon violation of Section 2 if there is clear and convincing evidence of such a violation." 50 Fed. Reg. 19122, 19131. Congress held oversight hearings in which several witnesses, including the Assistant Attorney General, Civil Rights Division, testified that clear violations of § 2 should not be precleared. See Oversight Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act, 99th Cong., 1st Sess., 47, 149, 151-152 (1985). Following these hearings, the House Judiciary Subcommittee on Civil and Constitutional Rights issued a Report in which it concluded "that it is a proper interpretation of the legislative history of the 1982 amendments to use Section 2 standards in the course of making Section 5 determinations." Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Voting Rights Act: Proposed Section 5 Regulations, 99th Cong., 2d Sess., Ser. No. 9, p. 5 (Comm. Print 1986). Although this history does not provide direct evidence of the enacting Congress' intent, it does constitute an informed expert opinion concerning the validity of the Attorney General's regulation.



suggests that had Congress wished to alter "our longstanding interpretation" of § 5, Congress would have made this clear. *Ante*, at 1496-1498. But nothing in our "settled interpretation" of § 5, *ante*, at 1500, is inconsistent with the Attorney General's reading of the statute. To the contrary, our precedent actually indicates that nonretrogressive plans that are otherwise discriminatory under *White v. Regester* should not be precleared. As neither the language nor the legislative history of § 5 can be said to conflict with the view that changes that clearly violate § 2 are not entitled to preclearance, there is no legitimate basis for refusing to defer to the Attorney General's regulation. See *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508, 112 S. Ct. 820, 831, 117 L.Ed.2d 51 (1992).

## II

In Part III of its opinion the Court correctly concludes that this action must be remanded for further proceedings because the District Court erroneously refused to consider certain evidence that is arguably relevant to whether the Board has proved an absence of discriminatory purpose under § 5. Because the Court appears satisfied that the disputed evidence may be probative of an "'intent to retrogress,'" it concludes that it is unnecessary to decide "whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." *Ante*, at 1501. For two reasons, I think it most unwise to reverse on such a narrow ground.

First, I agree with Justice BREYER, see *ante*, at 1505, that there is simply no basis for imposing this limitation on the purpose inquiry. None of our cases have held that § 5's purpose test is limited to retrogressive intent. In *Pleasant Grove v. United States*, 479 U.S. 462, 469-472, 107 S. Ct. 794, 798-801, 93 L.Ed.2d 866 (1987), for instance, we found that the city had failed to prove that its annexation of certain white areas lacked a discriminatory purpose. Despite the fact that the annexation lacked a retrogressive effect, we found it was subject to § 5 preclearance. *Ibid.*; see also *id.* at 474-475, 107 S. Ct. at 801-802 (Powell, J., dissenting) (contending that the majority erred in holding that a discriminatory purpose could be found even though there was no intent "to have a retrogressive effect"). Furthermore, limiting the § 5 purpose inquiry to retrogressive intent is inconsistent with the basic purpose of the Act. Assume, for example, that the record unambiguously disclosed a long history of deliberate exclusion of African-Americans from participating in local elections, including a series of changes each of which was adopted for the specific purpose of maintaining the status quo. None of those changes would have been motivated by an "intent to regress," but each would have been motivated by a "discriminatory purpose" as that term is commonly understood. Given the long settled understanding that § 5 of the Act was enacted to prevent covered jurisdictions from "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination," *South Carolina v. Katzenbach*, 383 U.S. at 335, 86 S. Ct. at 822, it is inconceivable that Congress intended to authorize preclearance of changes adopted for the sole purpose of perpetuating an existing pattern of discrimination.



Second, the Court's failure to make this point clear can only complicate the task of the District Court on remand. If that court takes the narrow approach suggested by the Court, another appeal will surely follow; if a majority ultimately agrees with my view of the issue, another remand will then be necessary. On the other hand, if the District Court does not limit its consideration to evidence of retrogressive intent, and if it therefore rules against the Board, respondents will bring the case back and the Court would then have to resolve the issue definitively.

In sum, both the interest in orderly procedure and the fact that a correct answer to the issue is pellucidly clear, should be sufficient to persuade the Court to state definitively that § 5 preclearance should be denied if Judge Kessler's evaluation of the record is correct.

Accordingly, while I concur in the judgment insofar as it remands the action for further proceedings, I dissent from the decision insofar as it fails to authorize proceedings in accordance with the views set forth above.

## APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civ. A. No. 94-1495 (LHS (USCA), CRR, GK)

BOSSIER PARISH SCHOOL BOARD, PLAINTIFF

*v.*

JANET RENO, ATTORNEY GENERAL, DEFENDANT

and

GEORGE PRICE, ET AL., DEFENDANT-INTERVENORS

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[Filed: November 2, 1995]

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BEFORE: SILBERMAN, Circuit Judge, RICHEY, and KESSLER, District Judges

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MEMORANDUM OPINION
OF THREE-JUDGE COURT
UNDER THE VOTING RIGHTS ACT

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SILBERMAN, Circuit Judge.

### INTRODUCTION

Plaintiff, Bossier Parish School Board, seeks preclearance under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, for its proposed redistricting. We shall grant the requested preclearance.

### I.

Bossier Parish is located in northwestern Louisiana, bordered on the north by Arkansas. As reported by the 1990 census, Bossier Parish's population is 86,088, of whom 20.1% are black. Blacks constitute 17.6% of the voting age population of Bossier Parish and 15.5% of its registered voters. Bossier City, the Parish's most populous city, is located in the central western portion of the Parish and has a population of 52,721, of whom 17.95% are black. The black population is also concentrated in Benton, Plain Dealing, Haughton, and in the unincorporated community of Princeton.

Bossier Parish is governed by a Police Jury, the 12 members of which are elected from single-member districts for consecutive four-year terms. At no time in Parish history have the Police Jury electoral districts included a district with a majority of black voters. Since 1983, however, a black police juror, Jerome Darby, has been elected three times from a majority-white district, the last time unopposed.[1]

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[1] The district from which Darby was elected in 1983 and 1987 was unique in Bossier Parish. Many of the white residents

The Police Jury undertook to redraw its electoral districts because of population shifts, as reflected in the 1980 census, that resulted in widely divergent populations among the existing districts. In November 1990, the Police Jury hired a cartographer, Gary Joiner, to assist in the process. At a public hearing on the Police Jury redistricting, black residents inquired about the possibility of creating majority-black districts, and were told that the black population of Bossier Parish was too far-flung to create any such district. On April 30, 1991, the Police Jury unanimously adopted one of the plans prepared by their cartographer as the final plan. The plan served the police jurors' incumbency concerns, and roughly provided for an even distribution of population among the districts. That same day, Concerned Citizens, a group of black residents of Bossier Parish, submitted a letter to the Police Jury complaining about the manner in which the redistricting plan was prepared and adopted. The plan was forwarded to the Attorney General on May 28, 1991, and, on July 29, 1991, the Attorney General precleared it. On January 11, 1994, the Police Jury unanimously voted to maintain the redistricting plan precleared by the Attorney General.

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of the district resided on or near Barksdale Air Force base and tended not to vote in Bossier Parish. This district, when the largely nonvoting military population is removed, was at least 45% black for the 1983 and 1987 Police Jury elections. In the 1991 Police Jury redistricting, however, the Air Force base was removed from Darby's district, after which he ran a successful, unopposed campaign.



The Bossier Parish School Board is constituted much like the Police Jury.[2] The School Board has 12 members elected from single-member districts to consecutive four-year terms. Both the Police Jury and School Board electoral districts have majority voting requirements: a candidate must receive a majority of the votes cast, not merely a plurality, to win an election. In the School Board's history, no black candidate has been elected to membership on the Board, though, as is discussed *infra*, one black School Board member was appointed to a vacant seat in 1992.

The Board, like the Police Jury, was also required to redraw its districts after the 1990 census. In fact, members of the Board had approached the Police Jury about the prospect of jointly redistricting, but were rebuffed by police jurors with incumbency concerns divergent from those of the School Board members.[3] The next scheduled election for the School Board was

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[2] At all relevant times, the Bossier Parish School Board has been the defendant in a lawsuit seeking the desegregation of the school district's schools. *Lemon v. Bossier Parish Sch. Bd.*, Civ. Act. No. 10,687 (W.D. La., filed Dec. 2, 1964). The School Board was found liable for intentionally segregating its public schools in violation of the Fourteenth Amendment in *Lemon v. Bossier Parish Sch. Bd.*, 240 F. Supp. 709 (W.D. La.1965), *aff'd*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911, 87 S. Ct. 2116, 18 L.Ed.2d 1350 (1967). In 1979, the School Board sought a declaration of unitary status and release from continuing court supervision. The Board's motion was denied and the school district has yet to be declared a unitary system. Of the 27 schools in the school district, five have predominately black student populations. [Stip ¶ 242.] The student population of Bossier Parish's schools is roughly 29% black.

[3] Throughout the 1980s, the Police Jury and School Board maintained different electoral districts.

not until November 1994, and the School Board did not undertake the task of redistricting with particular urgency. In May 1991, the Board hired the same cartographer who had assisted the Police Jury with its redistricting, Gary Joiner. When he was hired, Joiner informed the Board that one readily available option was the Police Jury plan which had already been precleared by the Attorney General and which, if adopted by the Board, was sure to be precleared again. When he was hired, Joiner estimated that the redistricting would require 200 to 250 hours of his time.

At a Board meeting in September 1991, Board member Thomas Myrick suggested that the Board adopt the Police Jury plan. Myrick had participated in a number of meetings with Joiner and police jurors during their redistricting. No action was taken on Myrick's proposal.

On March 25, 1992, George Price, president of the local chapter of the NAACP and a defendant-intervenor in this case, wrote to the Board to express the NAACP's desire to be involved in every aspect of the redistricting process. Price received no response to his letter and, on August 17, 1992, wrote again, this time to say that the NAACP would dispute any plan that did not provide for majority-black districts. At an August 20, 1992 meeting of the School Board, Price presented a number of proposals concerning the management of the school district to the School Board, including the appointment of a black to fill the vacancy on the Board created by a Board member's departure. Sometime during August 1992, Board



members met individually with Joiner to review different options for redistricting.[4]

During the summer of 1992, the NAACP Redistricting Project in Baltimore, Maryland prepared a redistricting plan for the School Board that included two majority-black districts. Price presented the results of these efforts, a partial plan demonstrating the possibility of two majority-black districts, to a School Board official. Price was told that the School Board would not consider a plan that did not set forth all 12 districts. Price brought just such a plan to the September 3, 1992 meeting of the School Board. At that meeting, both Joiner and Bossier Parish District Attorney, James Buller, dismissed the NAACP plan

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[4] Testimony was presented that, during the redistricting process, members of the School Board made statements possibly indicating that the School Board was undertaking the redistricting with a discriminatory intent. S.P. Davis, attorney for Bossier Citizenship Education, Inc., a plaintiff-intervenor in *Lemon*, and a witness for defendant, testified that Board member Henry Burns told Davis that "while he personally favors having black representation on the board, other school board members oppose the idea." [U.S. Exh. 106, at 17.] George Price testified that Board member Barry Musgrove told Price that "while he sympathized with the concerns of the black community, there was nothing more he could do for us on this issue because the Board was 'hostile' toward the idea of a black majority district." [D-I Exh. B at ¶ 28.] Price further testified that Board member Thomas Myrick told Price and Thelma Harry, another intervenor and a member of the Benton City Council, that "he had worked too hard to get [his] seat and that he would not stand by and 'let us take his seat away from him.'" [*Id.* at ¶ 29; D-I Exh. E at ¶ 19.]

because the plan required splitting a number of voting precincts.[5]

Under Louisiana law, school board districts must contain whole voting precincts (*i.e.*, they may not split voting precincts). *See* Louisiana Revised Statutes, Title 17, § 71.3E.(1) ("The boundaries of any election district for a new apportionment plan from which members of a school board are elected shall contain whole precincts established by the parish governing authority. . . ."). While there has been dispute over the matter, the parties have stipulated that school boards redistricting around the time the Bossier Parish School Board was redistricting were "free to request precinct changes from the Police Jury necessary to accomplish their redistricting plans." [Stip ¶ 23.] Defendant-intervenors' witness, David Creed, testified that he himself had routinely drawn redistricting plans that split precincts. The largest number of precincts that Creed had ever split was eight—far fewer than the 46 precinct splits resulting under the NAACP plan that was presented to the Board or any other plan proffered since by defendant or defendant- intervenors. In any event, the School Board never approached the Police Jury to request precinct changes.

On September 10, 1992, the School Board interviewed candidates for the one vacant seat on the School Board. By a six-to-five vote, the School Board appointed the only black candidate, Jerome Blunt. Defendant-Intervenors contend that this appointment

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[5] Both the Police Jury plan and the NAACP plan appear in an appendix to this opinion.



came despite "bitter opposition from white voters." [D-I Br. at 15.] On September 17, 1992, Blunt was sworn in as a Board member. His term in office lasted six months, ending in a special-election defeat to a white candidate. The vacant seat to which Blunt was appointed represented a district with the population that was 11% black.

At the same meeting during which Blunt took the oath of office, the School Board passed a motion of intent to adopt the Police Jury plan. The School Board announced that a public meeting would be held on September 24, 1992, with final action to be taken on the plan on October 1, 1992.

At the September 24, 1992 meeting, the School Board meeting room was filled to overflowing. Price presented the Board with a petition signed by more than 500 residents of the Parish asking that the Board consider alternative redistricting plans. Additionally, a number of black residents addressed the Board to express their opposition to the proposed Police Jury plan. No one spoke in support of the plan. On October 1, 1992, the School Board unanimously adopted the Police Jury plan. Although he had taken office in time to vote on the plan, Jerome Blunt abstained. One other School Board member, Barbara W. Gray, was absent and did not vote.

The plan adopted by the School Board pits two pairs of incumbents against each other, leaving two districts with no incumbents. The plan does not distribute the school district's schools evenly among the electoral districts: some have several schools, others have none.

On January 4, 1993, the School Board submitted its proposed redistricting plan to the Attorney General. On March 5, 1993, the Attorney General requested more information on the redistricting plan, which the School Board provided. On August 30, 1993, the Attorney General interposed a formal objection to the School Board's plan. The Attorney General's letter indicated that, while the identical Police Jury plan had been precleared, the Attorney General objected on the basis of "new information." The Attorney General noted that an alternative plan which showed "that black residents are sufficiently numerous and geographically compact so as to constitute a majority in two single-member districts" and which was preferred by members of the black community had been presented to and rejected by the School Board. The Attorney General further cited the School Board's failure to "accommodate the requests of the black community."

The Attorney General's objection letter stated that, while the School Board was not required to "adopt any particular plan, it is not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice." The Attorney General rejected the School Board's argument that the Louisiana statute concerning splitting precincts was sufficient reason not to create majority-black districts.

On September 3, 1993, the School Board unanimously voted to seek reconsideration of the objection from the Attorney General. On December 20, 1993, the Attorney General denied the Board's request for



reconsideration. The School Board filed this action on July 8, 1994. On April 10 and 11, 1995, this matter was tried before a single judge of this panel, pursuant to an agreement of the parties. The record of those proceedings has been provided to the other two judges on the panel and closing argument was conducted before the entire panel on July 27, 1995.

In the course of this litigation, defendant-intervenors have prepared two more plans that provide for two majority-black districts. Both plans were prepared by defendant-intervenor's witness, William Cooper. The first plan (Cooper I) provides for one majority-black district in the northwestern corner of the parish and one in Bossier City. The second plan (Cooper II) is not materially different. Neither of these plans was before the School Board when it adopted the Police Jury plan.[6]

## II.

For a political subdivision subject to section 5 to obtain preclearance of a voting change, it must prove that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. All parties agree that the "effect" prong of section 5 requires a showing of retro-

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[6] Because we hold, as is discussed below, that section 2 of the Voting Rights Act, 42 U.S.C. § 1973, has no place in this section 5 action, much of the evidence relevant only to the section 2 inquiry is not discussed in this opinion. We, of course, express no opinion on the merits of any case that may be filed under section 2.

gression. *See Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). And, all parties agree that the School Board's proposed redistricting will not have a retrogressive effect. The case, then, turns on whether plaintiff can by a preponderance of the evidence demonstrate that the redistricting plan was enacted without discriminatory purpose.

The School Board claims to have proved that a variety of nondiscriminatory purposes animated the School Board when they adopted the Police Jury plan. The School Board adopted the Police Jury plan because it had been precleared by the Attorney General and would provide an easy way to avoid the controversy that increasingly surrounded the redistricting process. Further, the Police Jury plan required that no precincts be split, avoiding the difficulty and expense that would have accompanied any other plan, and particularly the only other plan the School Board had seen: the NAACP plan. The School Board have throughout the litigation proffered a series of other purposes said to have motivated the decision to adopt the Police Jury plan. Among these were a desire to adhere to traditional districting principles and to avoid racial gerrymandering.

Defendant asserts that preclearance should be denied for at least one of several reasons. Defendant argues that we should deny preclearance because the School Board's redistricting plan violates section 2 of the Voting Rights Act. If we conclude that we may not engage in the section 2 inquiry in this section 5 case, defendant contends that we may nonetheless consider the School Board's violation of section 2 as



evidence of its discriminatory purpose. Defendant and defendant-intervenors further argue that we should deny preclearance based on "direct" and "indirect" evidence that the School Board acted with a discriminatory purpose.

## III.

### A.

Defendant and defendant-intervenors maintain that preclearance must be denied if the School Board's plan runs afoul of section 2 of the Voting Rights Act.[7] We hold, as has every court that has considered the question, that a political subdivision that does not violate either the "effect" or the "purpose" prong of section 5 cannot be denied preclearance because of an alleged section 2 violation.

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[7] Plaintiffs "stipulated" that "[s]ection 5 preclearance of the Bossier Parish School Board's redistricting plan also must be denied if the plan violates Section 2 of the Voting Rights Act, as amended, 42 U.S.C. 1973." [Stip ¶ 257.] Why plaintiffs would stipulate to a legal conclusion that no court considering the question has ever agreed to is beyond us. That plaintiffs did so stipulate does not, however, put the question beyond us. See *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99, 111 S. Ct. 1711, 1718, 114 L.Ed.2d 152 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."). In any event, plaintiff's strenuous argument that *Miller v. Johnson*, — U.S. ——, 115 S. Ct. 2475, 132 L.Ed.2d 762 (1995), is dispositive of this case is apparently inconsistent with its stipulation.

Defendant puts before us many arguments for the inclusion of section 2 in this section 5 action. Defendant contends that the statutory language of section 2 and section 5 are in significant part so indistinguishable as to require the importation of section 2 into section 5. It is also argued that the legislative history of section 2 makes clear that Congress, in amending section 2, intended that voting practices be denied section 5 preclearance where those voting practices violate section 2. Defendant finally contends that this court should defer to defendant's own regulations, which interpret section 5 as requiring denial of preclearance where a proposed change violates section 2.

Defendant has presented many, if not all, of these arguments to other courts and to other panels of this court without any success. Defendant acknowledges these prior cases, but claims that they are distinguishable from the one before us. We, like our predecessors, reject defendant's latest—and by now rather shopworn—effort to squeeze section 2 into section 5.

We are unconvinced by defendant's casual effort to equate the standards of section 2 and section 5. In its brief, defendant asserts that "there is no meaningful distinction between the plain meaning of the term [*sic*] 'effect' and 'result.'" [Def. Br. at 28.] To reach this facile conclusion, one must willfully blind oneself to the fact that the term "results" in subsection (a) of section 2 is defined by reference to the language set forth in subsection (b) of section 2. 42 U.S.C. § 1973. None of the language that modifies "results" in section 2 appears in section 5.



Not only are the two sections drafted with different language, even a cursory review of the case law applying the two statutory sections as written and as applied over the years makes clear that the two sections serve very different functions.

Section 5 of the Voting Rights Act establishes an extraordinary procedure in our federal system. Before a "covered jurisdiction"—*i.e.*, a State or one of its political subdivisions which is subject to section 5—may change a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," it must have the change precleared by either this court or the Attorney General.[8] *Id.*

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[8] A "covered jurisdiction" is a "State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of [title 42] based upon determinations made under the first sentence of section 1973b(b) of [title 42] are in effect." The prohibitions apply to any State or political subdivision

> which (i) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (ii) the Plaintiff's [*sic*] Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

42 U.S.C. § 1973b(b). A "test or device" is

> any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

§ 1973c. Preclearance in this court comes in the form of "a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in . . . this title." *Id.* § 1973c.

The Supreme Court has read the "effect" prong of section 5 to require that "no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). This "nonretrogression" interpretation has repeatedly been reasserted by the Supreme Court, most recently in *Miller v. Johnson*, — U.S. ——, ——, 115 S. Ct. 2475, 2493, 132 L.Ed.2d 762 (1995).

This formulation relates directly to section 5's function. Section 5 was enacted in response to the efforts of jurisdictions to avoid compliance with the Voting Rights Act by adopting new, violative schemes as quickly as the old ones could be struck down. *See Beer*, 425 U.S. at 140, 96 S. Ct. at 1363. "'By freezing election procedures in the covered areas unless the changes can be shown to be non-discriminatory,' section 5 ensures that a plaintiff seeking to challenge an existing voting scheme in federal court under section 2 will have a stationary target to attack." *New York v. United States*, 874 F.

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*Id.* § 1973b(c). The Bossier Parish School Board is indisputably a "covered jurisdiction."



Supp. 394, 400 (D.D.C.1994) (quoting *Beer*, 425 U.S. at 140, 96 S. Ct. at 1363 (internal citations omitted)).

Section 2 of the Voting Rights Act uses plainly different language and serves a different function from that of section 5. Under section 2, a "voting qualification or prerequisite to voting or standard, practice, or procedure" in any political subdivision (not just a covered jurisdiction) may be challenged where it "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Subsection (b) of section 2 provides that a voting procedure has the prohibited result where

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

*Id.* § 1973(b). Subsection (b) contains a different standard from the retrogression standard found by the Supreme Court in section 5; as courts have since recognized, section 2 can be violated without any discriminatory purpose and irrespective of whether the disputed voting practice is better or worse than whatever it is meant to replace. *See Thornburg v. Gingles*, 478 U.S. 30, 42-47, 106 S. Ct. 2752, 2761-64, 92 L.Ed.2d 25 (1986). Sections 2 and 5 are substantially different, both on their face and in the manner in which they have been interpreted and applied. *See*

*Holder v. Hall*, 512 U.S. 874, ——, 114 S. Ct. 2581, 2587, 129 L.Ed.2d 687 (1994) ("To be sure, if the structure and purpose of section 2 mirrored that of section 5, then the case for interpreting sections 2 and 5 to have the same application in all cases would be convincing. But the two sections differ in structure, purpose, and application." (footnote omitted)).

Moreover, the two sections differ as to the allocation of the burden of proof. In an action under section 5, the burden of proof is on the political subdivision seeking to enact a voting change. In a section 2 action, on the other hand, the burden of proof is on the party challenging a voting practice. *See, e.g., Hall v. Holder*, 955 F.2d 1563, 1573-74 (11th Cir.1992), *rev'd on other grounds*, 512 U.S. 874, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994); *Solomon v. Liberty County*, 899 F.2d 1012, 1036 (11th Cir.1990) (*en banc*) (Tjoflat, J., specially concurring); *cert. denied*, 498 U.S. 1023, 111 S. Ct. 670, 112 L.Ed.2d 663 (1991); *see also Burton v. Sheheen*, 793 F. Supp. 1329, 1351-52 (D.S.C.1992) (declining to import section 2 into section 5 because, *inter alia*, of the differing burdens of proof), vacated on other grounds *sub nom. Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968, 113 S. Ct. 2954, 125 L.Ed.2d 656 (1998); *City of Port Arthur v. United States*, 517 F. Supp. 987, 1005 n. 119 (D.D.C. 1981) (rejecting claim that section 2 action can collaterally estop section 5 action because, *inter alia*, burdens of proof in each case are different), *aff'd*, 459 U.S. 159, 103 S. Ct. 530, 74 L.Ed.2d 334 (1992). That crucial procedural difference strongly suggests the inappropriateness of importing section 2 standards into section 5.



Defendant's reliance on the legislative history of the amendments to section 2 is similarly unavailing. Where the language of a statutory regime is unambiguous, as it is here, we need not resort to that regime's legislative history. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L.Ed.2d 391 (1992). Even if the language of sections 2 and 5 did not plainly contemplate two different and independent inquiries, we would not be persuaded that what little legislative history defendant has discovered is sufficient to justify the radical expansion of an already significant encroachment on the prerogatives of States and their subdivisions. Defendant bases its recourse to legislative history in a footnote from the Senate Report that accompanied the 1982 amendments to section 2: "In light of the amendment to Section 2, it is intended that a Section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2." S. Rep. No. 97-417, 97th Cong., 2d Sess. at 12 n. 31 (1982) U.S.Code Cong. & Admin. News 1982 pp. 177, 189. Defendant also provides quotes to this effect from two sponsors of the 1982 amendments. The footnote appears in a report that accompanied the 1982 overhaul of section 2 that was precipitated by and intended to repudiate *Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L.Ed.2d 47 (1980). *Georgia v. Reno*, 881 F. Supp. 7, 13 (D.D.C. 1995). In *Mobile*, a plurality of the Supreme Court held that proof of discriminatory purpose was required for a section 2 violation. "The [footnote] cited by the defendants was intended merely to emphasize that proof of the requisite unlawful effect is in itself sufficient under either section, regardless of motive." *Id.* At that time, section 2 was wholly rewritten to provide that no

proof of discriminatory purpose is required in actions brought under it; section 5 remained—and remains today—as it had been written in 1975. In the face of the palpably different standards plainly embodied in sections 2 and 5, we think it not plausible that Congress would indicate its desire to raise the hurdle to preclearance by adding the requirements of section 2 to section 5 in a Senate Report footnote. *Accord Arizona v. Reno*, 887 F. Supp. 318 (D.D.C.1995). Had Congress plainly expressed this intention, we would be bound to follow. It did not and we are not.

The Department argues in its brief—although it appeared to retreat from this contention at closing argument—that an additional reason for the court to import section 2 into section 5 is that the Department of Justice has promulgated regulations stating that preclearance under section 5 ought to be denied where the proposed voting change violates section 2. *See* 28 C.F.R. § 51.55(b)(2) ("In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold section 5 preclearance."). The Department asserts that "the Attorney General's interpretations of the Act are entitled to great deference." [Def. Br. at 31.] Wherever else the Attorney General's interpretation of section 5 of the Voting Rights Act may be entitled to deference, it certainly is not in this court. We will not defer to the Attorney General where, under the statute, an action seeking preclearance may be brought here in the first instance. *See Litton Fin.*



*Printing Div. v. NLRB*, 501 U.S. 190, 203, 111 S. Ct. 2215, 2223, 115 L.Ed.2d 177 (1991) (citing *Local Union 1395, Int'l Brotherhood of Elec. Workers v. NLRB*, 797 F.2d 1027, 1030-31 (D.C. Cir. 1986)); *Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994) ("Even if an agency enjoys authority to determine such a legal issue administratively, deference is withheld if a private party can bring the issue independently to federal court under a private right of action."), *cert. denied sub nom. American Bankers Ass'n v. Kelley*, 513 U.S. 1110, 115 S. Ct. 900, 130 L.Ed.2d 784 (1995); *cf. Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1293 (D.C. Cir.), *aff'd*, 493 U.S. 38, 110 S. Ct. 398, 107 L.Ed.2d 277 (1989).

As we have noted, all courts to have considered the question have decided that section 2 may not be imported in section 5. *See Texas v. United States*, Civ. Act. No. 94-1529, Mem. Op. at 1-3, 1995 WL 769160 (D.D.C. July 10, 1995); *Arizona v. Reno*, 887 F. Supp. at 320-21; *Georgia v. Reno*, 881 F. Supp. at 13-14; *New York v. United States*, 874 F. Supp. 394 (D.D.C. 1994); *see also Burton v. Sheheen*, 793 F. Supp. at 1350-53. Defendant would distinguish these cases, insisting that the other panels refused to import section 2 into section 5 cases because the only alleged section 2 violation was the addition of judgeships to an already existing, already violative system for the election of judges.[9] *See Texas*; *Arizona*; *Georgia*; *New York*.

[9] Defendant also argues that these cases are wrongly decided and that as "the decisions of co-equal panels of this Court do not constitute binding precedent on this Court." [Def. Br. at 33.] Although we need not be bound by the decisions of co-equal panels, *see In re Korean Air Lines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir.1987), *aff'd sub nom.*

[Def. Br. at 34.] In this case, defendant contends that the proposed voting change is itself a violation of section 2 and that preclearance must therefore be denied. We are not persuaded. The reasoning used by the prior courts is just as applicable here, regardless of whether a given voting change is styled as an addition to a system that allegedly violates section 2 or a violation of section 2 itself. The statute does not provide for importation of section 2 into section 5, and the particular circumstances of a given section 5 preclearance action can make no difference whatsoever.

In its discussion of the importation of section 2 into section 5, defendant makes no mention of *Miller v. Johnson*. In *Miller*, the Attorney General denied preclearance for the Georgia General Assembly's congressional redistricting plan until it provided for three majority-black districts. — U.S. at ——, 115 S. Ct. at 2489. In finding that the General Assembly had made race the "predominant factor" in its redistricting and thereby violated the Equal Protection Clause, the Court held that the manner in which the Attorney General had employed section 5 of the Voting Rights Act was "insupportable," and that the Attorney General's incorrect interpretation of section 5 could not be a compelling state interest sufficient to survive strict scrutiny. *Id.* — U.S. at ——, 115 S. Ct. at 2492. Although much of the discussion in *Miller* con-

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*Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 109 S. Ct. 1676, 104 L.Ed.2d 113 (1989), we certainly can be persuaded by them, particularly given the three-judge constitution of these panels and the fact that, in this curious corner of the law, the only entity besides co-equal panels of this court that can ever consider these questions is the Supreme Court.



cerns the Equal Protection clause, *Miller* is very much a statutory interpretation case. The Supreme Court, rather than decide the constitutional question of whether compliance with the Voting Rights Act could serve as a compelling state interest, expressly repudiated the Department's interpretation of section 5. *Id.* — U.S. at —— - ——, 115 S. Ct. at 2490-91. The Court noted that the purpose of section 5 is to avoid retrogression in the position of minority voters, and stated that the "Justice Department's maximization policy seems quite far removed from this purpose." *Id.* — U.S. at ——, 115 S. Ct. at 2493. "In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld." *Id.* The Supreme Court further observed that it had upheld section 5 in *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L.Ed.2d 769 (1966), as a

> necessary and constitutional response to some states' "extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." . . . But [its] belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case.[10]

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[10] The federalism costs of section 5 (even without the importation of section 2) have been noted throughout its history. *See Georgia v. United States*, 411 U.S. 526, 545, 93 S. Ct. 1702, 1713, 36 L.Ed.2d 472 (1973) (Powell, J., dissenting) ("It is

*Id.* (quoting *Katzenbach*, 383 U.S. at 335, 86 S. Ct. at 822).

Although *Miller* makes no explicit reference to the injection of section 2 into section 5, the import of the opinion on this issue is clear. So long as the standard for the "effect" prong of section 5 remains "nonretrogression," the only way for defendant to require the creation of additional majority-black districts before preclearance will be granted is to import the standards of section 2 into the section 5 preclearance process. The very language with which the Attorney General objected to the School Board's redistricting plan makes plain that section 2's standards informed the Attorney General's objection to the School Board's plan. *Miller*,[11] however, makes crystalline

indeed a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a State to submit its legislation for advance review."); *South Carolina v. Katzenbach*, 383 U.S. at 359-60, 86 S. Ct. at 834 (Black, J., dissenting in part) ("[section] 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that 'The United States shall guarantee to every State in this Union a Republican Form of Government' "); *Georgia v. Reno*, 881 F. Supp. at 13 n. 8 (noting that the "extraordinary nature of section 5" argued against importing section 2 into section 5).

[11] Compare the Attorney General's August 30, 1993 letter ("[T]he proposed plan, adopted by the parish police jury and recommended by the school board's consultant, *would appear to provide no opportunity for black voters to elect a candidate of their choice* to the school board." (emphasis added)) with section 2 (a violation of section 2 is proved where "it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [minority citizens] in that [they] have *less opportunity*



what was already clear: section 2 and its standards have no place in a section 5 preclearance action. *See also Texas v. United States*, Civ. Act. No. 94-1529, Mem. Op. at 2-3.

In what may by now be a conditioned response, defendant argues that even if we decide that a section 2 action cannot be brought in a section 5 preclearance proceeding, we must still consider evidence of a section 2 violation as evidence of discriminatory purpose under section 5. We again disagree. As we have said, the statutory language sets forth differing standards for the two sections. The line cannot be blurred by allowing a defendant to do indirectly what it cannot do directly. The federalism costs already exacted by section 5 are seriously increased if, under the guise of "purpose" evidence, alleged section 2 violations must be countered by the political subdivision whenever it seeks preclearance. *See New York v. United States*, 874 F. Supp. at 399 ("Were we to accept defendant's theory that discriminatory intent may always be inferred from the existence of an allegedly discriminatory system, nearly every section 5 preclearance proceeding could potentially be transformed into full-blown section 2 litigation. We think a rule creating such a state of affairs both unwarranted and unwise."). And, *Miller* forecloses the permitting of section 2 evidence in a section 5 case. As a panel of this court recently noted,

than other members of the electorate to participate in the political process and to *elect representatives of their choice*" (emphasis added)).

> the Court [in *Miller*] reaffirmed that the "purpose" prong of section 5 must be analyzed within the context of section 5's purpose, which "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."

*Texas v. United States*, Civ. Act. No. 94-1529, Mem. Op. at 2 (July 10, 1995) (quoting *Miller*, — U.S. at ——, 115 S. Ct. at 2493). Given the variety of good reasons not to import section 2 into section 5, we will not permit section 2 evidence to prove discriminatory purpose under section 5.[12]

**B.**

The parties agree that the proposed redistricting will not result in retrogression of minority voting strength in Bossier Parish, and thus, that the "effect" prong of Section 5 is not in issue. The

[12] At closing argument, defendant's counsel was presented with the question of whether a school board that affirmatively decides not to take race into account in any way could be found to have violated section 5. Counsel stated that a school board with the history and context of the Bossier Parish School Board declined to take race into account would indeed violate section 5. This strikes us as double counting. The reason the Bossier Parish School Board is subject to section 5 at all is, at least in part, because of its history and context. Now that it is subject to section 5, defendant would again cite the School Board's history as a reason to saddle it with the additional burden of affirmatively taking race into account in order to prove that it did not have the proscribed purpose.



statute requires a covered political subdivision seeking a declaratory judgment to prove that the proposed voting change "does not have the purpose *and* will not have the effect of denying or abridging the right to vote." 42 U.S.C § 1973c (emphasis added).

Plaintiff bears the burden of proving that it did not adopt the Police Jury plan with a discriminatory purpose. *Rome v. United States*, 446 U.S. 156, 183, 100 S. Ct. 1548, 1565, 64 L.Ed.2d 119 (1980) ("Under [section] 5, the city bears the burden of proving lack of discriminatory purpose and effect."). All courts agree that the entity seeking preclearance has the burden of proving that the proposed change has neither a discriminatory effect nor a discriminatory purpose. How this plays itself out in litigation has been left largely unexplored. But it must be recognized that placing a burden of proving nondiscrimination on the plaintiff is anomalous under our law; the plaintiff is put in the position of proving a negative.[13]

Courts have devised complex burden-shifting regimes for litigation under Title VII and section 2 of the Voting Rights Act. In an action under Title VII, a plaintiff complaining of discrimination in the employment context must set forth a prima facie case of discrimination. At that point, the burden shifts to the employer to prove that the complained-of employment action was undertaken for other, nondiscriminatory reasons. The burden then shifts back to the plaintiff

[13] It is particularly anomalous where the voting change has no retrogressive effect and the political subdivision thus bears the burden of proving that when it did nothing bad, it did so with a non-bad motive.

to prove that the employer's offered reasons are pretextual. *See, e.g., Johnson v. Transportation Agency*, 480 U.S. 616, 628, 107 S. Ct. 1442, 1450, 94 L.Ed.2d 615 (1987); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). Similarly, courts in section 2 cases have held that once the plaintiff establishes a prima facie case of vote dilution, the burden shifts to the political subdivision to prove that the voting regime does not result in, or have as its purpose, discrimination. *See, e.g., Hall v. Holder*, 955 F.2d 1563, 1573-74 (11th Cir. 1992), *rev'd on other grounds*, 512 U.S. 874, 114 S. Ct. 2581, 129 L.Ed.2d 687 (1994); *Solomon v. Liberty County*, 899 F.2d 1012, 1036 (11th Cir. 1990) (*en banc*) (Tjoflat, J., specially concurring). In actions under both Title VII and section 2, the burden-shifting regimes were enacted in order to alleviate the difficulty for plaintiffs of proving that defendants acted with discriminatory intent. These procedural services thus do not appear appropriate to a section 5 case.

To be sure, something like a burden shifting must occur in this, as in every other, civil case. Once the Board makes out its prima facie case, it is entitled to preclearance unless its prima facie case is rebutted. *See Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, ——, 114 S. Ct. 2251, 2259, 129 L.Ed.2d 221 (1994) ("[W]hen the party with the burden of persuasion establishes a prima facie case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true"). If it is rebutted, then we must weigh the School Board's evidence against that proffered on the other side. If the evidence is equally convincing on either side, the School Board—bearing



the risk of nonpersuasion—must lose. *See McCain v. Lybrand*, 465 U.S. 236, 257, 104 S. Ct. 1037, 1050, 79 L.Ed.2d 271 (1984) (in the preclearance process, "the burden of proof (the risk of non-persuasion) is placed upon the covered jurisdiction"). If, however, the School Board's evidence is more persuasive than the evidence proffered against it, the School Board is entitled to preclearance. To make out a *prima facie* case for preclearance, the School Board must demonstrate that the proposed change will have no retrogressive effect, and that the change was undertaken without a discriminatory purpose. Proof of nondiscriminatory purpose must include "legitimate reasons" for settling on the given change. *Richmond v. United States*, 422 U.S. 358, 375, 95 S. Ct. 2296, 2306, 45 L.Ed.2d 245 (1975). When the *prima facie* case has been made by the School Board, defendant must offer evidence in rebuttal in order to prevent preclearance.[14]

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[14] A panel of this court recently stated that, in order to prove that it has not acted with the prohibited intent, the section 5 plaintiff, "[a]s a practical matter," must come forward with evidence of legitimate, nondiscriminatory motives for the proposed changes to the voting laws. In addition, the plaintiff must furnish some affirmative evidence that the proposed changes were not motivated by a discriminatory purpose. Once the section 5 plaintiff has made such a showing, the burden shifts to the Attorney General, as the party resisting preclearance, to provide some evidence of a discriminatory purpose on the part of the legislators who seek to make the change. In the absence of such a showing, the section 5 plaintiff will be found to have carried its burden of establishing a lack of discriminatory purpose. *New York v. United States*, 874 F. Supp. at 400. That opinion, unfortunately, did not cite any authority for this division of the burden of proof.

The School Board has offered a host of non-discriminatory reasons for adopting the Police Jury plan. We are satisfied that at least two of these are "legitimate, nondiscriminatory motives," *New York*, 874 F. Supp. at 400.[15]

The Police Jury plan offered the twin attractions of guaranteed preclearance and easy implementation (because no precinct lines would need redrawing). The School Board did not like the Police Jury plan when it was first presented to them, and there were certainly reasons not to. The Police Jury plan wreaked havoc with the incumbencies of four of the School Board members and was not drawn with school locations in mind. When, however, the redistricting process began to cause agitation within the black community, and when it became obvious that any plan adopted by the School Board would give rise to controversy and division (and we find that by the time the NAACP's redistricting plan had been presented to the School Board, the Board could very reasonably foresee this), the Police Jury plan became, as Board member Myrick described it, "expedient." Any port will do in a storm, and when the clouds over the School Board's redistricting process began to grow ominous, the *only* close port was the already precleared Police Jury plan.

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[15] In the course of litigation, the School Board has offered several reasons for its adoption of the Police Jury plan that clearly were not real reasons. At one point, the School Board maintained that it adopted the plan (on October 1, 1992) to avoid running afoul of *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L.Ed.2d 511 (1993) (decided June 28, 1993).



Defendant and defendant-intervenors contend that the Police Jury plan itself was precleared by the Attorney General only because relevant information was withheld from the Attorney General. In order for this to be evidence that the School Board adopted the Police Jury plan with an impermissible purpose, the School Board would have to have known that such information had been withheld from the Attorney General, and that but for that withholding, the Attorney General would not have precleared the Police Jury plan. We know of no evidence even suggesting the School Board had any knowledge that the Police Jury plan had been precleared illegitimately if in fact it had been.

Further, the Police Jury plan would require no splitting of precincts. While the evidence on the effect of a school board's efforts to redistrict in a way that splits precincts is confused, what is uncontroverted is that changing precincts is neither guaranteed nor free. The NAACP plan presented to the School Board—the only other plan available to the school board at the time—split at least 46 precincts. Defendant-intervenors' witness, David Creed, who testified that precinct-splitting was quite common and that he himself had drawn several redistricting plans that split precincts, [D-I Exh. F at 2-3], had never drawn a plan that split more than eight precincts. [Tr. II, at 119.] Splitting precincts would have required assistance from the Police Jury—a body that had rebuffed the School Board's earlier overtures for coordinated efforts. And, the splitting of precincts would have cost money. Evidence was presented that each precinct split would cost $850, and even if this number was substantially overstated, no one suggests

that precincts can be split for free. When the School Board began the redistricting process, it likely anticipated the necessity of splitting some precincts. It hired the Police Jury's cartographer with the expectation that he would spend a substantial amount of time on the project, and it was given maps of the then-existing precincts and told it would have to work with the Police Jury with respect to the precincts. Nonetheless, the School Board entirely reasonably could have, when faced with the NAACP's plan, arrived quickly at the conclusion that zero precinct splits was significantly more desirable than 46.

Moreover, in the midst of the controversy, at the behest of the black community, and over the "bitter opposition" of some white constituents, the School Board itself appointed a black member to its only vacant seat in time to participate in and vote on the adoption of the Police Jury plan. Defendant tries to minimize this fact by noting that the vote was only six to five, that Jerome Blunt was appointed to a district that was 89% white, and that Blunt promptly lost in a special election six months later. That Blunt was appointed by a bare majority tells us nothing more than that at least a majority of the white Board members were responsive to the black community and were not opposed to black representation on the School Board. That Blunt lost his next election cannot, we think, be fairly laid at the School Board's door, particularly given that the district to which he was appointed—again, at the behest of George Price and others—was the only one with a vacancy. This appointment, particularly when its timing and context are considered, indicates that a majority of the white Board members not only were not opposed to



black representation on the School Board, but affirmatively brought it about for the first time in Parish history.

The School Board thus has presented a *prima facie* case for preclearance. Defendant seeks to rebut this case by presenting what it styles as "direct" and "indirect" evidence of discriminatory purpose.

The "direct" evidence presented by defendant and defendant-intervenors consists of the alleged statements of three School Board members. We conclude that none of the statements attributed to these Board members, if they were in fact made, show that the Board acted with a discriminatory motivation. The first statement offered by defendant is perhaps the most troubling. S.P. Davis, an attorney representing a plaintiff-intervenor in the *Lemon* suit, testified that Board member Henry Burns told him that, while Burns himself had no opposition to the idea, other members of the Board were "hostile to black representation on the School Board."[16] Plaintiffs did not cross-examine Davis on this point, so we do not know more specifically what Davis understood Burns to mean by "black representation." The phrase is subject to at least two interpretations. We would be troubled indeed if Burns was referring to hostility on the part of other Board members to the presence of black persons as members of the School Board. But, because at least six of the School Board members proved their lack of hostility to this sort of black

[16] We note the difficulty involved in giving weight to testimony as to an out-of-court statement by a third party concerning the mental state of other, unnamed third parties.

representation by appointing a black Board member, we do not believe that Burns meant this. If Burns meant, by "black representation," that other members of the School Board were opposed to the intentional drawing of majority-black districts in order to ensure black representation on the Board, that is hardly an indication of discriminatory purpose unless section 5 imposes an affirmative obligation to draw additional majority-black districts. There are a host of entirely legitimate reasons to oppose this sort of district-drawing. A Board member could, for example, be opposed to districts that split numerous precincts or that violated traditional districting principles.

Board member Barry Musgrove's alleged statement to George Price that, while Musgrove was not personally opposed, other Board members were hostile to drawing majority-black districts is also relied upon by defendant. Musgrove denies making this statement, [Tr. I, at 56.], but we will assume for this analysis that he said what Price says he said. But again, this statement is not evidence of discriminatory purpose. A Board member could have any number of perfectly legitimate reasons to oppose the drawing of majority-black districts, particularly in the manner of the NAACP plan. Without more than Price's testimony, we will not assume the worst and credit the unnamed School Board members with an untoward motivation when the statement lends itself just as easily to a nondiscriminatory interpretation.

The last Board-member statement emphasized by defendant is that of Thomas Myrick, as testified to by intervenors George Price and Thelma Harry, that Myrick would not let his seat be taken. But, we do not



attribute a racist motivation to the perfectly understandable expression by an incumbent of the strong desire not to have his district so changed that his constituency is obliterated. Even if Myrick's statement was an indication of a discriminatory purpose on Myrick's part—which we do not think it was—on this record it would be inappropriate to attribute such a purpose to the other nine members of the Board who voted to adopt the Police Jury plan.[17]

The "indirect" evidence defendant most heavily relies upon is the "sequence of events leading to the school board's adoption of the police jury plan." [Def. Br. at 15.] Defendant argues that these events raise an inference that the plan was adopted with a discriminatory purpose. Defendant notes that when the Police Jury plan was first presented to the Board, the Board declined to adopt it, in part because it pitted two pairs of incumbents against each other. Defendant also emphasizes the Board's unwillingness to permit participation in the redistricting process by George Price and the NAACP; most of the redistricting work done by the Board was not done publicly. And, defendant argues, and regards as the nail in the School Board's coffin, that the Board "rushed to adopt the police jury plan" only after it "was confronted with the NAACP's plan." [Def. Br. at 18.] If the only evidence before us were that summarized here and relied on so heavily by the

[17] When asked at oral argument for the best evidence of discriminatory purpose, counsel for defendant-intervenors pointed to the remarks of the school board members. Our dissenting colleague thinks little of this evidence: "These statements standing alone would certainly be insufficient to show discriminatory purpose." Dissent at 459.

defendant, we would still have difficulty following its inferential leap. We think that assuming that the quick rejection of the NAACP plan is probative of a discriminatory purpose requires at least that the Board have regarded the NAACP plan as a plausible plan. We have no evidence that the plan was, as an objective matter, plausible (after all, it split 46 precincts and is no longer seriously put forward by either defendant or defendant-intervenors). And, we have no indication that the School Board itself thought the plan plausible. The existence of the NAACP plan demonstrated to the Board that its efforts to redistrict would be subject to exacting review and vociferous criticism. The swift selection of the only plan around that bore the imprimatur of the Attorney General resembles not a brazen stroke in the name of racist redistricting but an understandable, if not necessarily laudable, retreat from a protracted and highly charged public battle. In light of this, and mindful of the Board's demonstrable willingness to *ensure* black representation on the Board (the creation of a majority-black district would not necessarily lead to the election of a black Board member, while the appointment of a black Board member unavoidably would), we think defendant and defendant-intervenors' inference is unjustified.[18]

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[18] Defendant mentions the continuing duty of the School Board to "remedy any remaining vestiges of the dual [school] system" under the order in *Lemon v. Bossier Parish School Board*, 240 F.Supp. 709 (W.D. La. 1965), citing in particular the School Board's failure to maintain a biracial committee. We fail to see how this can be in any way related to the School Board's purpose in adopting the Police Jury plan.



At bottom, defendant's argument that the School Board's adoption of the Police Jury plan rather than something like the NAACP plan runs afoul of section 5 is indistinguishable from an argument rejected by the Court in *Miller v. Johnson*. Here, defendant argues that the School Board has failed to provide an adequate reason explaining why it declined to act on a proposal featuring two majority-black districts. In *Miller*, the "key to the Government's position . . . is and always has been that Georgia failed to proffer a nondiscriminatory purpose for its refusal in the first two submissions to take the steps necessary to create a third majority-minority district." — U.S. at ——, 115 S. Ct. at 2492. The Supreme Court described this position as "insupportable" and stated that Georgia's adherence to "other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the Constitution,' and thus cannot provide any basis under § 5 for the Justice Department's objection." *Id.* — U.S. at ——, 115 S. Ct. at 2492 (citations omitted). We note that, in *Miller*, the Department of Justice denied preclearance until the Georgia Assembly had drawn three of 11 (or 27%) black majority districts in a State with a population that is 27% black. The Supreme Court agreed with the district court that the Department of Justice was engaged improperly in "black-maximization" on a theory of section 5 that the Supreme Court rejected. *Id.* *Here*, defendant denied preclearance noting that the Board had adopted the Police Jury plan when it had before it a plan that provided for two of 12 (or 18%) majority-black districts in a parish with a voting-age population that is 17.6% black. The key to defendant's

position in this case, similarly, is that the School Board has not provided an adequate explanation for adopting the precleared Police Jury plan when it had before it the NAACP plan. As *Miller* makes clear, the adoption of one nonretrogressive plan rather than another nonretrogressive plan that contains more majority-black districts cannot by itself give rise to the inference of discriminatory purpose. Defendant here, as it did in *Miller*, pursues a theory the result of which is that no political subdivision presented with a plan that provides for $x$ number of majority-black districts can ever adequately explain its reasons for adopting a plan that provides for $x$ minus $n$ majority-black districts. The *Miller* Court rejected this theory of section 5, and we will not resuscitate it here.

Accordingly, we grant plaintiff Bossier Parish School Board the requested declaratory judgment.

[Maps included as an appendix to the opinion, but omitted from this appendix, are reproduced at 907 F. Supp. at 451-452; the originals are U.S. Exhs. 76A and 77F.]



KESSLER, District Judge, concurring in part and dissenting in part.

I concur in the holding of section III(A) of the majority opinion, namely, that section 2 of the Voting Rights Act may not be imported into section 5. 42 U.S.C. § 1973c. The statute does not compel such a reading, and all three-judge panels which have addressed the issue have concluded that section 2 requirements are not part of section 5. *See Texas v. United States*, Civ. No. 94-1529, Slip. op. at 2, 1995 WL 456338 (D.D.C. Apr. 24, 1995); *Arizona v. Reno*, 887 F. Supp. 318, 321-22 (D.D.C. 1995); *Georgia v. Reno*, 881 F. Supp. 7, 13-14 (D.D.C. 1995); *New York v. United States*, 874 F. Supp. 394, 400 (D.D.C. 1994). Sections 2 and 5 are undoubtedly "designed to complement and reinforce each other," *Arizona*, 887 F. Supp. at 321, but because they "differ in structure, purpose and application," *Holder v. Hall*, 512 U.S. 874, ——, 114 S. Ct. 2581, 2587, 129 L.Ed.2d 687 (1994) (opinion of Kennedy, J.), the inquiries into each section are independent. Our colleagues in *Arizona*, recently considered the identical issue, and our holding today with respect to sections 2 and 5 is consistent with that opinion: The School Board may receive clearance under section 5 without demonstrating that its redistricting decision complies with section 2, and the Department may not withhold preclearance merely by establishing a section 2 violation. *See Arizona*, 887 F. Supp. at 323-24.

As to section III(B) of the majority opinion, however, I cannot in good conscience agree with the result reached by my two colleagues. The extensive record demonstrates that the Bossier Parish School

Board did not act with "legitimate, nondiscriminatory motives." *New York*, 874 F. Supp. at 400. Rather, in light of the impact the School Board's decision will have on the black community, the long history of discrimination and segregation in the Bossier Parish school system, the perpetuation of the exclusion of blacks from full participation in the electoral process, the significant timing of events that led up to the School Board's decision, and the noticeable departures from normal procedure, I am convinced that the School Board acted with "the purpose . . . [of] abridging the right to vote on account of race or color" in violation of the Voting Rights Act, 42 U.S.C. § 1973c. Accordingly, I would deny preclearance, and I respectfully dissent.

## I.

Under section 5 of the Voting Rights Act, the burden of proving that the adopted plan does not have a discriminatory purpose rests squarely with the Bossier Parish School Board. *Rome v. United States*, 446 U.S. 156, 183 n. 18, 100 S. Ct. 1548, 1565 n. 18, 64 L.Ed.2d 119 (1980); *Georgia v. United States*, 411 U.S. 526, 538, 93 S. Ct. 1702, 1709, 36 L.Ed.2d 472 (1973). As stated succinctly by the majority, if the evidence is equally convincing on either side, the School Board—bearing the risk of nonpersuasion—must lose. Maj. Op. 446; *see McCain v. Lybrand*, 465 U.S. 236, 257, 104 S. Ct. 1037, 1050, 79 L.Ed.2d 271 (1984) (in the preclearance process,



"the burden of proof (the risk of nonpersuasion) is placed upon the covered jurisdiction").[1] In this case, the evidence is far from being equally convincing on either side. Not only does the evidence fail to prove absence of discriminatory purpose, it shows that racial purpose fueled the School Board's decision.

## II.

The Supreme Court has told us that "[d]etermining whether invidious purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 564, 50 L.Ed.2d 450 (1977). Such evidence, the Court stated, includes the impact the state's action has on protected minority groups; the historical background of the challenged decision; the specific sequence of events leading up to that decision; any substantive departure from the normal process; and the legislative or administrative history of the decision. *Id.* 429 U.S. at 266-268, 97 S. Ct. at 564-565. *See also Busbee v. Smith*, 549 F. Supp. 494, 516-517 (1982), *aff'd*, 459 U.S. 1166, 103 S. Ct. 809, 74 L.Ed.2d 1010 (1983). Applying this legal standard to the record

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[1] While it may be true that this burden-shifting scheme is "anomalous under our law," Maj. Op. at 445-446, that should have no influence on our decision. Congress decides how to write the country's statutes, and Congress clearly believed that the states' open defiance of the Equal Protection Clause—what the Supreme Court called an "insidious and pervasive evil,"—*South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S. Ct. 803, 808, 15 L.Ed.2d 769 (1966), was serious enough to warrant the "federalism costs," Maj. Op. at 444, of the Voting Rights Act.

before us, I find that the evidence demonstrates conclusively that the Bossier School Board acted with discriminatory purpose.[2]

A.

In *Arlington Heights*, the Court said that when analyzing the government's purpose, "an important starting point . . . [is the] impact of an official action—whether it 'bears more heavily on one race than another.'" *Arlington Heights*, 429 U.S. at 266, 97 S. Ct. at 563 (quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 2049, 48 L.Ed.2d 597 (1976)). The Board's adoption of a redistricting plan with no majority-black districts undoubtedly "bears more heavily" on the black community in Bossier Parish than on the white community, because it effectively prevents black voters from electing candidates of their choice to the School Board.

In Bossier Parish, voting is racially polarized, Stips. ¶¶ 181-196. No black person has ever been elected to the Bossier Parish School Board, Stip ¶ 153, despite the fact that 20.1% of the population of Bossier Parish is black, Stip. ¶ 5, and almost 30% of its public schools are black. Stips. ¶¶ 5, 134. Given this context, black voters may well require a majority-black district in order to have a fair chance

[2] It is teliing that the majority never once refers to *Arlington Heights* when they evaluate the evidence submitted by the Department and Intervenors. *See* Maj. Op. at 447-449. Indeed, the majority articulates no standard by which it decides whether "the School Board's evidence is more persuasive than the evidence proffered against it." Maj. Op. at 446.



of electing candidates of their choice. Further, "[b]ecause it is sensible to expect that at least some blacks would have been elected [to the Board], the fact that none have ever been elected is important evidence of purposeful exclusion." *Rogers v. Lodge*, 458 U.S. 613, 623-24, 102 S. Ct. 3272, 3279, 73 L.Ed.2d 1012 (1982). As one federal court of appeals noted, "nothing is as emphatic as zero." *United States v. Hinds County School Board*, 417 F.2d 852, 858 (5th Cir. 1969). The fact is, the Board's plan presents the black minority of Bossier Parish with no realistic opportunity to elect any candidates of its choice to any of the board seats.

Moreover, as Defendant-Intervenors demonstrated, it was clearly possible to draw a redistricting plan for the Bossier Parish Schools with one or two majority-black districts, and still respect traditional districting principles.[3] The School Board admits that it is "obvious that a reasonably compact black-majority district could be drawn in Bossier City." Stip. ¶ 36. But rather than consider either of the alternative proposals brought before it or direct their own cartographer to draft one, the School Board adopted a plan "which guaranteed that blacks would remain underrepresented on the [School Board] by comparison to their numerical strength in the enlarged community." *City of Port Arthur v. United States*, 517 F. Supp. 987, 1022 (D.D.C. 1981), *aff'd*, 459

[3] In addition to the plan presented to the School Board on September 3, 1992, Defendant-Intervenors have presented two other plans that show it is possible to draw majority-black districts in Bossier Parish which are fully consistent with traditional districting principles.

U.S. 159, 103 S. Ct. 530, 74 L.Ed.2d 334 (1982). This conscious decision to adopt a plan that effectively excludes minority voters from the political process is probative of discriminatory intent.

**B.**

The Supreme Court has held specifically that "the historical background of the challenged decision" is properly part of the purpose inquiry under the Voting Rights Act. *Arlington Heights*, 429 U.S. at 267, 97 S. Ct. at 564. Here, the history of discrimination and racism in and out of the school system demonstrates that the School Board's vote was yet another chapter in its long-standing refusal to address the concerns of the black community of Bossier Parish. Evidence of historical discrimination "is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized . . . and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo." *Rogers*, 458 U.S. at 625, 102 S. Ct. at 3279.[4]

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[4] The majority excludes evidence of historical discrimination in the Bossier Public Schools and Bossier Parish because it believes that such "evidence [is] relevant only to the section 2 inquiry." Maj. Op. at 440, n.5. In my view, the majority wrongly believes that once we decide that sections 2 and 5 are analytically distinct, we may not use evidence of historical discrimination (which is central to a section 2 inquiry) to decide the "purpose" prong of section 5. But as the panel recently explained in *Arizona v. Reno*, 887 F. Supp. at 323, nothing in the statute or case law leads to that conclusion. "Although the inquiry required under the purpose prong of section 5 extends into areas that would also be relevant in a section 2 proceeding," that does not mean that considering evidence of historical discrimination is "tantamount to launching a section 2 proceeding . . . under the guise of section 5." *Id.* at 323. More importantly, excluding evidence of historical discrimination contravenes the Supreme Court's explicit direction in *Arlington Heights*, where the Court stated that among the factors to consider in the "purpose" inquiry is the "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes." 429 U.S. at 268, 97 S. Ct. at 564. In short, the majority ignores the standard the Supreme Court established to govern precisely the type of inquiry we must make in this case.



It is undisputed that Louisiana and the Bossier school system have a history of segregation and racial discrimination predating the Civil War. Following the passage of the Thirteenth Amendment, Louisiana began what the Supreme Court has called "unremitting and ingenious" defiance of the Constitution, *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S. Ct. 803, 808, 15 L.Ed.2d 769 (1966), by passing laws designed to disenfranchise black voters. Stip. ¶ 216. One law prohibited elected officials from helping illiterates. Another statute required all voters to use complex application forms, prohibited explanation of application questions, and facilitated wholesale purges by party officials of voters who managed to register successfully. *Id.* The new laws reduced black registration by 90 percent in the state, leaving only 10 percent of adult black males eligible to vote. Stip. ¶ 216. Two years later, in 1889, Louisiana's Constitutional Convention imposed a "grandfather" clause and educational and property qualifications for voter registration. Both provisions were designed to limit black political participation,

Stip. ¶ 217, and both succeeded: black males constituted just 4 percent of the state's population. *See United States v. State of Louisiana*, 225 F. Supp. 353, 373 (E.D. La. 1963).

In 1921, pursuant to state law, the state Democratic party established an all-white primary. Stips. ¶¶ 220, 222. That same year, the Legislature replaced the grandfather clause with a requirement that an applicant "give a reasonable interpretation" of any section of the federal or state constitution in order to vote. Stip. ¶ 221. After the all-white primary was struck down by a federal court, the Democratic party adopted an anti-single-shot law, and a majority vote requirement for party officers. *Major v. Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983). The "reasonable interpretation" requirement was finally held unconstitutional by the United States Supreme Court in 1965. *Louisiana v. United States*, 380 U.S. 145, 85 S. Ct. 817, 13 L.Ed.2d 709 (1965).

In the Bossier school system it was much of the same. Despite the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873 (1954), *de jure* segregation was the rule in Louisiana public schools, and federal courts were forced to order school districts to comply with federal law. Stip. ¶ 235. Since 1965, the Bossier Parish School Board has been the defendant in *Lemon v. Bossier Parish School Board*, Civ. Act. No. 10,687 (W.D. La., filed Dec. 2, 1964) in which it was found liable for intentionally segregating the public schools in violation of the Fourteenth Amendment. *Lemon v. Bossier Parish Sch. Bd.*, 240 F. Supp. 709 (W.D. La.



1965), *aff'd*, 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911, 87 S. Ct. 2116, 18 L.Ed.2d 1350 (1967).

Throughout the late 1960's and early 1970's, the school board sought to limit or evade its desegregation obligations. At one point, the School Board sought to assign black children of Barksdale Air Force Base personnel to black schools without a right to transfer to white schools, claiming that they were "federal children" and not within the "jurisdiction" of the school district. Stip. ¶ 237. Circuit Judge Wisdom rejected the School Board's "new and bizarre excuse" for rationalizing its denial of the constitutional right of black school children to equal educational opportunities. *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 849 (5th Cir. 1967).

In 1969, the Fifth Circuit rejected the school board's "freedom of choice" plan in *Hall v. St. Helena Parish Sch. Bd.*, 417 F.2d 801 (5th Cir. 1969), and in 1970, after "protracted litigation," rejected another inadequate remedial plan proposed by the district in *Lemon v. Bossier Parish Sch. Bd.*, 421 F.2d 121 (5th Cir. 1969).

In 1971, the court held unconstitutional the School Board's plan to assign students to one of two schools in Plain Dealing based on their test scores. *Lemon v. Bossier Parish Sch. Bd.*, 444 F.2d 1400 (5th Cir. 1971). In 1979, the School Board filed a motion seeking a declaration of unitary status and a release from further court supervision. The motion was denied, and the school district has yet to be declared a unitary system. Stip. ¶ 239. Since 1980, despite the School Board's continuing duty to desegregate, the number

of elementary schools with predominately black enrollments has increased from one to four. To this day, the School Board remains under direct federal court order to remedy any remaining vestiges of segregation in its schools.

The Board has also failed to honor the *Lemon* court's order to maintain a Biracial Committee to "recommend to the School Board ways to attain and maintain a unitary system and to improve education in the parish." Stip. ¶ 111. The committee met only 2 or 3 times, and only the black members attended. For decades following the court's order, the Board ignored this requirement altogether. Stip. ¶ 112. In 1993, the Board finally established a similar committee, but disbanded it after three months because, according to School Board Member Barry Musgrove, "the tone of the committee made up of the minority members of the committee quickly turned toward becoming involved in policy." Stip. ¶ 116. What exactly the Committee was supposed to become involved in, if not policy, is unclear. What is clear is that the Board's unilateral dismantling of the Committee was in direct violation of a federal court order to address the concerns of the black community.

The School Board's adoption of the Police Jury plan must be evaluated in the framework of this long history of official discrimination. It may seem unduly harsh to consider racism and discrimination dating back to the Civil War, but this history reveals an insidious pattern which cannot be ignored, and must inform our decision today. Like the school boards and legislatures before it, the Bossier Parish School Board's actions effectively eliminate the black community from the political process. So long as black voters have no electoral power, they have no voice, and the School Board can safely ignore their concerns.



C.

The Supreme Court has told us that "the specific sequence of events leading up to the challenged decision may shed some light on the decisionmaker's purpose." *Arlington Heights*, 429 U.S. at 267, 97 S. Ct. at 564. Here, the sequence of events leading up to the adoption of the Police Jury plan supplies further proof of discriminatory purpose.

The redistricting process began in May, 1991, when the Board decided to develop its own plan rather than adopt the one accepted by the Police Jury. Given the fact that the next School Board election was not scheduled until October, 1994, there was no need for hasty Board action. The Board hired Gary Joiner, a cartographer, who had drawn the Police Jury plan. He was hired to perform 200-250 hours of work, far more time than would be needed simply to recreate the Police Jury plan. Stip. ¶ 86. On July 29, 1991, the Police Jury plan was precleared by the Justice Department. On September 5, 1991, however, the School Board decided not to adopt the Police Jury plan, largely because it would pit incumbents against each other. Over the course of the next year, School Board members considered a number of redistricting options. Mr. Joiner met privately with School Board members and demonstrated different possibilities to them on his computer. Stip. ¶ 96. These meetings

were not open to the public nor were there any recorded minutes or published notice of the meetings.

While the School Board was meeting and planning in private, the black community was trying, unsuccessfully, to participate in public. In March of 1992, George Price, on behalf of a coalition of black community groups, wrote the School Board asking to participate in its redistricting process. Stip. ¶ 93. Neither the Board nor the Superintendent responded to this request. *Id.* In August of 1992, Mr. Price sent another letter asking specifically to be involved in every aspect of the redistricting process. Again, no response. Stip. ¶ 94.

Frustrated by the School Board's unresponsiveness, Price contacted the NAACP Redistricting Project in Baltimore. The Project developed a partial plan for Price to present to the School Board that consisted of two majority-black districts. Stip. ¶ 98. The plan did not show the other ten districts that made up the Parish. When Price showed this plan to a school district official, he was told that the plan was unacceptable because it only showed two districts. Price went back to the NAACP and a new plan was drawn up.

Then, on September 3, 1992, when Price appeared on behalf of the black community at a public hearing and presented a new plan showing all twelve districts, including two majority-black districts, the Board dismissed it summarily, claiming—incorrectly—that



they could not consider any plan that split precinct lines.[5] Stip. ¶ 102.

At its next meeting, on September 17, 1992, without any further consultation with its cartographer or attempt to address the concerns of the black community, the School Board passed a motion of intent to adopt the Police Jury plan, which had no majority-black districts. At that meeting, Mr. Price again presented the NAACP proposal. Stip. ¶ 106. Instead of discussing the plan with Mr. Joiner, or asking him to further analyze the possibility of drawing black-majority districts without splitting precincts (the School Board's purported reason for rejecting the plan), the Board simply passed the motion of intent to adopt the Policy Jury plan at the next School Board meeting. *Id.*

One week later, on September 24, 1992, an overflow crowd attended a public hearing on the redistricting plan. Fifteen people spoke against the School Board's proposed plan, most of whom objected because it would dilute minority voting strength. Not a single person spoke in favor of the plan. Stip. ¶ 108. At this hearing, Mr. Price presented the Board with a petition signed by more than 500 Bossier Parish citizens, asking the Board to consider an alternative redistricting plan. *Id.*

Despite the one-sided input from Bossier citizens, and despite the fact that the Board was under no time pressure to decide the issue, the Board voted one week later to adopt the Police Jury plan. As with the

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[5] See discussion at pages 443-444, *infra*.

meetings of September 3 and September 17, the Board's minutes of the October 1, 1995 meeting reflect little substantive consideration of the Police Jury plan, other than to approve the Police Jury plan as quickly as possible.[6] Board Member Myrick testified that the Board adopted the plan that evening because it was "expedient."

The Police Jury plan only became "expedient" when the School Board was publicly confronted with alternative plans demonstrating that majority-black districts could be drawn, and demonstrating that political pressure from the black community was mounting to achieve such a result. The common-sense understanding of these events leads to one conclusion: The Board adopted the Police Jury plan—two years before the next election—in direct response to the presentation of a plan that created majority-black districts. Faced with growing frustration of the black community at being excluded from the electoral process, the only way for the School Board to ensure that no majority-black districts would be created was to quickly adopt the Police Jury plan and put the issue to rest. This sequence of events of "public silence and private decisions,"[7] culminating in the Board's hasty decision, is evidence of the Board's discriminatory purpose.

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[6] For example, the Board seems to have abandoned its concerns about the Police Jury plan pitting incumbents against each other.

[7] Def.-Int. Bf. at 20.



D.

The fact that the Board adopted a plan which departs substantively from its earlier districting plans and which ignores factors it has usually considered of paramount concern, is probative of discriminatory purpose, "particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 267, 97 S. Ct. at 564. The most glaring example is that the adopted plan forced incumbents to run against each other. Incumbency protection has always, understandably, been a high priority for both the Police Jury and School Board. That was the reason there were different redistricting plans in effect for each entity during the 1980s. That was also the reason the Police Jury refused to conduct a joint redistricting effort with the school board after 1990.

Moreover, the plan adopted by the Board contravenes other traditional districting principles. For example, it creates one district containing almost half of the geographic area in the Parish. Stip. ¶ 140. Several of its districts are not compact, according to the Board's own consultant. Stip. ¶ 139. In addition, the plan creates election districts without any schools in them and ignores school attendance boundaries. Stip. ¶ 141. Finally, the plan does not respect communities of interest in Bossier Parish. Stips. ¶¶ 135-137.

Perhaps if the Board had ignored one or two of these standard redistricting criteria, it would not be noteworthy, but when the Board's plan plainly violates a whole number of redistricting principles, we have further evidence from which to infer that the Board's decision was fueled by discriminatory purpose.

**E.**

In setting forth the evidentiary categories to be evaluated in determining whether invidious purpose was a motivating factor, the Supreme Court in *Arlington Heights* noted that its listing of such categories was not exhaustive. 429 U.S. at 268, 97 S. Ct. at 565. Thereafter, in *Rogers v. Lodge*, 458 U.S. 613, 102 S. Ct. 3272, 73 L.Ed.2d 1012 (1982), the Court considered additional political and sociological factors that underscored the state's discriminatory purpose. In *Rogers*, the Court struck down Burke County, Georgia's at-large election system, holding that it violated the Fourteenth and Fifteenth Amendments because the state had acted with discriminatory purpose. The Court considered important the fact that "lingering effects of past discrimination," caused socioeconomic disparity between whites and blacks. *Id.* 458 U.S. at 626, 102 S. Ct. at 3280 (citations omitted). The Court also said that it was important to consider the educational disparity between whites and blacks. *Id.* 458 U.S. at 624, 102 S. Ct. at 3279. Here, it is undisputed that black citizens in Bossier Parish suffer a markedly lower socioeconomic status than their white counterparts, and that the difference is



traceable to the legacy of racial discrimination in the Parish. Stip. ¶ 200.

According to the 1990 Census,[8] the poverty rate for blacks (44.7%) is nearly five times the rate for whites (9.1%). The per capita income of blacks ($5,260) is only 40% of that enjoyed by whites ($12,966). The unemployment rate for blacks age 16 and over (22.4%) is nearly four times that for whites. The percentage of blacks over 25 without a high school degree (40.6%) is over twice the rate of whites (16.7%). Only 4.8% of whites age 25 and older have less than a ninth grade education, while 22.8% of blacks in the same age category have less than a ninth grade education. Almost 84% of whites 25 years or older were at least high school graduates, compared to only 58.7% of blacks. Also, 17% of whites 25 years or older had at least four years of college, compared to only 8.1% of blacks. In 1990, only 2.9% of the white labor force were unemployed, while 9.1% of the black labor force was unemployed. Finally, whites are five times as likely to own a car as blacks, a significant fact in a rural parish where voting places may be distant from people's homes.

It is also undisputed that the depressed socioeconomic and educational levels of blacks within Bossier Parish make it hard for them to obtain necessary electoral information, organize, raise funds, campaign, register, and turn out to vote, and this in turn causes a depressed level of political participation for blacks within Bossier Parish. Stip. ¶ 213. Like the state representative in Burke County in *Rogers*,

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[8] Stips. ¶¶ 204, 208, 211.

the School Board members in Bossier Parish "have retained a system which has minimized the ability of [Bossier Parish] Blacks to participate in the political system." 458 U.S. at 626, 102 S. Ct. at 3280 (citations omitted).

Thus, the additional factors identified by the Supreme Court in *Rogers*, are met foursquare in this case. As the Court explained in *Rogers*, "[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." 458 U.S. at 618, 102 S. Ct. at 3276 (quoting *Washington v. Davis*, 426 U.S. at 242, 96 S. Ct. at 2049).

**F.**

We also have before us statements made by three School Board members about minority representation on the Board. School Board member Henry Burns said that while he "personally favors having black representation on the board, other school board members oppose the idea." U.S. Exh. 106 ¶ 17. School Board member Barry Musgrove said that "while he sympathized with the concerns of the black community, there was nothing more he could do . . . on this issue because the Board was 'hostile' toward the idea of a black majority district." *Id.* And School Board member Thomas Myrick told George Price of the NAACP that "he had worked too hard to get [his] seat and that he would not stand by and 'let us take his seat away from him.'" U.S. Exh. 106 ¶ 29, D-I Exh. E ¶ 19.



These statements standing alone would certainly be insufficient to show discriminatory purpose. However, considered in the context of the School Board's discriminatory past, the efforts to preserve segregation and exclude black representation from the Board, the sequence of events leading up to the Board's decision, and the anomalous nature of the plan itself, the statements add further proof of improper motive. While the majority is correct that the statements are subject to different interpretations, Maj. Op. at 447-448, given all the evidence previously set forth showing discriminatory purpose, and the efforts of the past fifty years to desegregate the schools, it seems fair to conclude that at least some School Board Members were openly "hostile" to black representation on the school board.[9]

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[9] The majority argues that the appointment of Jerome Blunt to fill a vacant seat on the Board "proved [the Members'] lack of hostility to this sort of black representation." Maj. Op. at 447. However, Mr. Blunt was appointed to represent a district that was only 11% black, and his short tenure on the job was a stark reminder of the highly polarized voting in Bossier Parish, *see* section II(A), *supra*. Mr. Blunt's chances of reelection were slight, and his short-lived appointment was a far-cry from the full tenure of an elected black school committee member. The majority notes, however, that the "timing and context" of Blunt's appointment indicate that the Board acted for legitimate reasons. Maj. Op. at 447. The facts suggest the opposite. Blunt was appointed on September 17, 1992—squarely in the middle of the controversy surrounding the redistricting plan—at the very meeting where the Board adopted a motion of intent to adopt the Police Jury plan and after George Price had made his demands for a majority-black district. Certainly, Board members knew that adopting the Police Jury plan would ignite controversy in the black community. And on the very night of that decision, the School

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For all the foregoing reasons, the only conclusion that can be drawn from the evidence is that the Bossier School Board acted with discriminatory purpose. The adopted plan has a substantial negative impact on the black citizens of Bossier Parish. The sequence of events leading up to the decision show conclusively how the School Board excluded the black community from the redistricting process and rushed to adopt the Police Jury plan only when faced with an alternative plan that provided for black representation. The plan itself ignores and overrides a number of the School Board's normally paramount interests. And the statements of some School Board members certainly lend strength to the other evidence. "Justice is blind; but courts nevertheless do see what there is clearly to be seen."[10] We cannot blind ourselves to the reality of the situation and the record before us. The Bossier School Board acted with discriminatory purpose in adopting the Police Jury Plan.[11]

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Board appointed a black to fill a seat that they knew he would be unable to hold, hoping to quell the political furor over adoption of the Police Jury plan.

[10] *Laker Airways Limited v. Pan American World Airways*, 568 F. Supp. 811, 816 (D.D.C. 1983). While Judge Harold Greene made this observation in a very different context (an antitrust case), its pithiness and wisdom apply beyond that context.

[11] Because of the paucity of public discussion about the Board's decision (except for those who opposed it), and because the Board left virtually no legislative history, we cannot assess the "minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 268, 97 S. Ct. at 565. Given the considerable evidence showing discriminatory purpose, however, the Board's failure to document its decisionmaking process is certainly suspect.



## III.

In the face of this considerable evidence, the School Board has offered several reasons for its adoption of the Police Jury plan. Even the majority admits that a number of these reasons "clearly were not the real reasons," Maj. Op. at 446, n. 14, *i.e.*, the School Board lied.

For example, at one point, the School Board argued that it adopted the Police Jury plan (on October 1, 1992) to comply with *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L.Ed.2d 511 (1993) (decided June 28, 1993), which was decided nine months *after* the Board adopted its plan. Although the Board does not lie as fragrantly in its remaining rationales, they are equally unconvincing.

The School Board claims that it could not adopt any plan with majority-black districts because such a plan would require precinct-splitting, which violates state law and would be prohibitively expensive. The evidence shows conclusively, however, that throughout the redistricting process, the School Board was willing to split precincts to do just that, *i.e.*, to split precincts so long as it was for the protection of incumbents. It was only *after* the black community presented its alternative plan that the School Board proffered the "no precinct-splitting" rationale.

The majority agrees that when "the School Board began the redistricting process, it likely anticipated the necessity of splitting some precincts." Maj. Op. at 447. The School Board hired Mr. Joiner at the beginning of the process to develop the plan, fully intending that he would split precincts (that is why he needed between 200-250 hours to complete the job). At the September 5, 1991 School Board meeting, the first School Board meeting after the Police Jury plan had been precleared by the Department, Mr. Joiner presented proposed maps that showed split precincts. Further, it is now undisputed by the School Board that splitting precincts does not violate state law. While the School Board itself may not split precincts, police juries have the authority to establish and modify precinct lines, Stips. ¶¶ 13-23, and many do so when requested by a school board. The Bossier Parish Police Jury itself created 13 new precincts in 1991, Stip. ¶ 60, and the School Board has stipulated that the Police Jury was currently considering consolidating some of its precincts for other reasons. Stip. ¶ 61.

Once again, it was only after being presented with the black community's plan, and the possibility of a majority-black district in the ensuing election, that the Board totally reversed itself and "arrived quickly," Maj. Op. at 447, at the conclusion that it was *against* splitting districts. Nor did the School Board voice its concern about *too many* precinct splits causing higher election costs in its initial submission to the Department. U.S. Exh. 102 at 9 (testimony of Blunt). Moreover, the Board never estimated the cost of splitting precincts before it voted to adopt the Police Jury plan. *Id.* Obviously, "cost" did not



actually motivate the School Board's decision at the time it was made. The focus of our inquiry is what motivated the Board *at the time of its decision*, not whether post-decision rationales would have been legitimate reasons. The Board's excuses on the significant subject of precinct-splitting are clearly not justified.

The final reason offered by the School Board is that the Police Jury plan guaranteed preclearance, that is, the Department would approve the School Board's plan because it was identical to the Police Jury plan which was precleared on July 29, 1991. It is clear, however, that "guaranteed preclearance" was not the School Board's motive as it began the redistricting process, because if so, it would not have waited until October 1, 1992—almost 14 months later—to adopt the Police Jury plan. If guaranteed preclearance was what the Board wanted, it would have acted soon after the Police Jury plan was precleared by the Justice Department on July 29, 1991. As with the precinct-splitting issue, this rationale also surfaced only after the School Board was faced with alternative plans that could conceivably lead to majority-black districts and an elected black member.[12] The evidence shows

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[12] It is hard to accept the majority's unduly charitable characterization of this decision as nothing more than "an understandable, if not necessarily laudable, retreat from a highly charged public debate," Maj. Op. at 449, when the evidence shows overwhelmingly that the black community was excluded from that public debate. School Board members did more than simply retreat from a political debate; in the guise of "expediency," Dep. of Myrick, they excluded black citizens from the only process that would allow that community to elect a candidate of its choice.

that School Board members adopted the Police Jury plan not because it "guaranteed preclearance," but because given growing dissatisfaction in the black community, it was the only way to ensure that there would be no black majority districts.

The Board's rationales simply do not withstand a common-sense reading of the record. Some of the rationales are untrue on their face, and others do not bear even minimum scrutiny. Most of the alleged justifications are absent from the public record, so the School Board asks us to accept their post-hoc rationalizations rather than focus on their motive at the time of the decision. "[I]nvidious purpose may often be inferred from the totality of the relevant facts." *Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 2048.

The evidence is clear that racial purpose was "a motivating factor in the [Board's] decision" to adopt the Police Jury plan. *Arlington Heights*, 429 U.S. at 265-266, 97 S. Ct. at 563 (emphasis added). The burden of proof is on the School Board to show absence of discriminatory purpose, *Rome v. United States*, 446 U.S. 156, 183 n. 18, 100 S. Ct. 1548, 1565 n. 18, 64 L.Ed.2d 119 (1980), and it has woefully failed to satisfy that burden. Its rationales are so flagrantly pretextual as to further corroborate the conclusion that the School Board acted with discriminatory purpose.

## IV.

The School Board claims that the Supreme Court's recent decision in *Miller v. Johnson*, — U.S. ——, 115 S. Ct. 2475, 132 L.Ed.2d 762 (1995), precludes it



from adopting any majority-black districts because such districts would constitute "racial gerrymandering" in violation of the Equal Protection Clause. The School Board's reading of *Miller* is erroneous for a number of reasons.

First, this is simply not a *Miller* case. We do not have *any* plan with majority-black districts to evaluate, no less a plan where, as in *Miller*, "race was the overriding and predominant force in the districting determination." *Id.* — U.S. at ——, 115 S. Ct. at 2485. Since the School Board chose to adopt the Police Jury plan, it would be sheer speculation on the basis of this record to determine whether "race was the predominant factor motivating," *id.* — U.S. at ——, 115 S. Ct. at 2485, some other hypothetical redistricting plan. Defendant and Defendant-Intervenors are not even arguing that any particular plan should have been adopted by the School Board. How, in the absence of any concrete plan, can a court decide whether a plaintiff has proven that the government "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, [and] respect for political subdivisions or communities"? *Id.* — U.S. at ——, 115 S. Ct. at 2488. The court would be speculating, and the prohibition against advisory opinions prohibits us from answering such hypothetical legal questions. *See Flast v. Cohen*, 392 U.S. 83, 96-97, 88 S. Ct. 1942, 1950-51, 20 L.Ed.2d 947 (1968) (such suits lack the "clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests").

The Court was extraordinarily sensitive in *Miller* "to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, — U.S. at ——, 115 S. Ct. at 2488. It recognized that legislatures engaged in this difficult process "will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." *Id.* (citations omitted). The Court also understood the delicate line-drawing that fact-finders would have to engage in:

> "The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision . . .".

*Id.*

It would be impossible, without an actual plan, without "circumstantial evidence of a district's shape and demographics," without a showing that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,"



for a court to make the informed and sophisticated judgment called for by the Supreme Court in *Miller*. If and when the School Board does adopt a plan with one or more majority-black districts, the court may then determine whether that plan violates *Miller*.

Second, the Court made clear in *Miller* by its repeated citations to and discussion of *Arlington Heights*, that it was not altering the legal standard by which we assess violations of Section 5. *See, e.g., Miller*, — U.S. at ——, 115 S. Ct. at 2487 (quoting *Arlington Heights* for proposition that in purpose inquiry, courts must look at impact and "other evidence of race-based decisionmaking"). *See also id.* — U.S. at ——, 115 S. Ct. at 2483. Plaintiffs must still prove the absence of discriminatory purpose, applying the standards set forth in *Arlington Heights* and related cases in the voting rights area, such as *Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L.Ed.2d 47 (1980) and *Rogers v. Lodge*, 458 U.S. 613, 102 S. Ct. 3272. As the evidence shows, the School Board has made no such showing. The School Board would, through its reading of *Miller*, essentially undercut the vitality of *Arlington Heights* in a Section 5 case. That was not the intent of the Supreme Court.

Third, assuming *arguendo*, the existence of some hypothetical plan which contains one or more majority-black districts (we do not know which since we do not have a plan before us), the record makes clear that it is possible to draw at least one such district in Bossier Parish, consistent with *Miller* and *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L.Ed.2d 511 (1993). By affirming the race-conscious California redistricting plan in *DeWitt v. Wilson*, 856

F. Supp. 1409 (E.D. Cal. 1994) (decided the same day as *Miller*), *aff'd*, — U.S. ——, 115 S. Ct. 2637, 132 L.Ed.2d 876 (1995), the Supreme Court made clear that considering race in redistricting, by itself, does not automatically trigger strict scrutiny. In *DeWitt*, the district court found that the California plan "evidences a judicious and proper balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process." 856 F. Supp. at 1413-14.

As noted earlier, *Miller* recognizes that "traditional race-neutral districting principles [such as] compactness, contiguity, and 'respect for political subdivisions' . . . can defeat a claim that a district has been gerrymandered on racial lines." *Miller*, — U.S. at ——, 115 S. Ct. at 2488 (citations omitted). As discussed in detail above, *see* Section II(D), *supra*, the alternative plans presented to the School Board and this court do rely upon "traditional districting principles." The districts in the illustrative plans are contiguous, reasonably compact, and respect communities with actual shared interests. *See* Testimony of Price; Testimony of Hawkins; Stips. ¶¶ 181-95. Moreover, at least one of the alternative plans would unite a predominantly black residential area, which is split under the Board's plan. "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." *Shaw v. Reno*, 509 U.S. at ——, 113 S. Ct.



at 2826 (1993). Thus, assuming these districts existed—and they do not—the School Board could not meet its burden under *Miller* to show that race rather than traditional districting principles was the predominant force.

For all of these reasons, the School Board's reliance on *Miller v. Johnson* is unpersuasive.

## V.

The evidence in this case demonstrates overwhelmingly that the School Board's decision to adopt the Police Jury redistricting plan was motivated by discriminatory purpose. The adoption of the Police Jury plan bears heavily on the black community because it denies its members a reasonable opportunity to elect a candidate of their choice. The history of discrimination by the Bossier School System and the Parish itself demonstrates the Board's continued refusal to address the concerns of the black community in Bossier Parish. The sequence of events leading up to the adoption of the plan illustrate the Board's discriminatory purpose. The School Board's substantive departures from traditional districting principles is similarly probative of discriminatory motive. Three School Board members have acknowledged that the Board is hostile to black representation. Moreover, some of the purported rationales for the School Board's decision are flat-out untrue, and others are so glaringly inconsistent with the facts of the case that they are obviously pretexts.

* * * * * *

Sometimes we need to step back and look at first principles. Congress passed the Voting Rights Act to combat the "unremitting and ingenious defiance of the Constitution" by several states, *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S. Ct. 803, 808, Louisiana among them. The Bossier School Board continues to resist the Constitution, through its ingenious, if subtle, discrimination against the black citizens of Bossier Parish. We are long past the point where discrimination can be easily proven by use of racial epithets, racial categories or openly exclusionary voting requirements. "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen v. State Board of Elections*, 393 U.S. 544, 565, 89 S. Ct. 817, 831, 22 L.Ed.2d 1 (1968). In this case, the School Board's decision to adopt the Police Jury plan was a thinly-veiled effort to deny black voters a meaningful opportunity for representation on the School Board.

The burden is on the School Board to show lack of discriminatory purpose. Because the School Board's proffered reasons are pretextual, it has not met its burden under section 5 of the Voting Rights Act, and its request for pre-clearance must be denied.



**APPENDIX D**

[CAPTION OMIITTED]

FINAL STIPULATIONS OF FACT AND LAW

The parties in the above-captioned case respectfully submit the following stipulations of fact and law.

STIPULATIONS OF FACT

*Background, Method of Election, and Demographics*

1. Bossier Parish is located in northwest Louisiana, bordered at the north by the State of Arkansas. The parish seat is Benton, but the major city is Bossier City. Benton is in the northern part of the parish, and Bossier City is in the south-central portion.

2. The Bossier Parish School District, which is coterminous with Bossier Parish, is the only school district in Bossier Parish.

3. Bossier Parish is governed by a police jury, which consists of twelve police jurors elected in nonpartisan elections from single-member districts to four-year, concurrent terms with a majority vote requirement.

4. The Bossier Parish School District is governed by a school board, which consists of twelve members elected in nonpartisan elections from single-member districts to four-year, concurrent terms with a majority vote requirement. No black person ever has been elected to the Bossier Parish School Board.

5. According to the 1990 Census, Bossier Parish had a total population of 86,088 of whom 65,812 (76.45

percent) were non-Hispanic white persons and 17,301 (20.1 percent) were non-Hispanic black persons.

6. According to the 1980 Census, Bossier Parish had a total voting age population of 60,904 of whom 48,130 (79.03 percent) were non-Hispanic white persons and 10,726 (17.61 percent) were non-Hispanic black persons.

7. According to the 1980 Census, Bossier Parish has a total population of 80,721 of whom 63,127 (78.2 percent) were non-Hispanic white persons and 15,024 (18.61 percent) were non-Hispanic black persons.

8. According to the 1980 Census, Bossier Parish had a total voting age population of 54,545 of whom 43,620 (79.97 percent) were non-Hispanic white persons and 9,315 (17.08 percent) were non-Hispanic black.

9. There are four municipalities located in Bossier Parish: Benton (the parish seat), Bossier City, Haughton and Plain Dealing (one very small portion of the City of Shreveport is also located in Bossier Parish).

10. According to the 1990 Census, Bossier City had a total population of 52,721 persons, of whom 9,463 (17,95%) were non-Hispanic black persons. Bossier City had a total voting age population of 37,455 of whom 5,659 (15.11%) were non-Hispanic black persons. Thus, more than 50 percent of the black population of Bossier Parish is concentrated within the City of Bossier. The remainder is concentrated in the areas of Benton (2,047 residents, of whom 41.3 percent are non-Hispanic black persons); Plain Dealing (1,074 residents, of whom 33.0 percent are non-Hispanic black persons); (Haughton (1,664 residents, of whom



464, or 27.9 percent are non-Hispanic black persons); and the unincorporated community of Princeton (635 persons, of whom 500, or 78.5% are non-Hispanic black persons).

*Section 5 Preclearance Review*

11. On May 28, 1991, the Bossier Parish Police Jury submitted its 1991 redistricting plan to the Department of Justice for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The plan featured twelve single-member districts, all twelve of which had a majority of white persons. During the 1990-1991 Police Jury redistricting process leading up to the preclearance submission, no alternative plan featuring black-majority districts had been presented. An April 30, 1991 letter detailing complaints regarding the redistricting process from the Concerned Citizens of Bossier Parish, a local black organization, was not included in the preclearance submission. In a letter dated July 29, 1991, the Department of Justice precleared the Police Jury plan.

12. On January 4, 1993, the Bossier Parish School Board submitted its redistricting plan to the Justice Department for preclearance review. The plan submitted was identical to the Police Jury Plan precleared in 1991. During the 1991-1992 redistricting process leading up to that submission, an alternative plan was presented which demonstrated that two black-majority districts could in fact be drawn within Bossier Parish. During that same period of time, police jury elections occurred under the new police jury redistricting plan which shed light on voting patterns within Bossier Parish. In a letter dated August 30, 1993, the Justice Department objected to the School Board plan.

*Redistricting in Bossier Parish, Louisiana*

13. Louisiana state law provides that the parish governing body has the authority to draw, cut, or consolidate election precincts. In Bossier Parish, that body is the Police Jury. State law also provides that precincts must be wholly contained within a police jury or other election district.

14. Pursuant to the relevant state laws in effect at the time, the parish police jury was to draw its redistricting plan (where necessary due to population shifts and the one-person, one-vote requirement) in 1991, making what precinct adjustments were necessary to accomplish that redistricting. Once police jury districts and election precincts were drawn by the police jury, the parish school board would be able to conduct its own redistricting (if necessary).

15. State law further provided that police juries could not subdivide precincts during 1991, except for subdivisions occasioned by redistricting, which could be adopted during a 45-day "window" between April 1, 1991 and May 15, 1991. Louisiana R.S. 18:532.1 H(1).

16. Louisiana Revised Statutes 18:532.1 H(2) allows a parish to divide a precinct into two or more precincts by visible features which are census tabulation boundaries during April 1, 1991 through May 15, 1991.

17. Louisiana Revised Statues 18:532.1 H(2)(d) provides that if the Department of Justice should object to a parish reapportionment plan, then that parish may divide a precinct into two or more precincts by visible features which are census tabulation boundaries "in order to satisfy said objections of the Department of Justice."



18. There are no requirements for minimum populations in a precinct, either by total population, voting age population, or registered voters.

19. State law further provided that after redistricting in 1991, parishes could not consolidate precincts until January 1, 1993. Louisiana R.S. 18:532.1 H(2).

20. Pursuant to the same statutory scheme, school boards in Louisiana normally would redistrict after the police jury. Where, as in Bossier Parish, school boards had the same number of seats as the police jury in a particular parish, that school board could not change, split or consolidate the precincts established by the police jury, but instead had to use those precincts as units for redistricting.

21. Louisiana Revised Statutes, Title 17, Section 71.3E(1) and (2) reads as follows:

> "E.(1) The boundaries of any election district for a new apportionment plan from which members of a school board are elected shall contain whole precincts established by the parish governing authority under R.S. 18:532 or 532.1.
>
> (2)(a) Notwithstanding the provisions of R.S. 17:71(E)(1) or any other law to the contrary, if a school board is unable to meet the federal guideline of plus or minus five percent deviation in the creation of its reapportionment plan through the use of whole precincts, the school board may, in the creation of its reapportionment plan, divide a precinct into portions which are bounded by visible features which are census tabulation boundaries. No such precinct shall be

divided into more than two school board districts. No school board district shall contain more than two divided precincts.

(b) The provisions of this Paragraph shall be applicable only in cases in which the number of members of the school board is not equal to the number of members of the parish governing authority of the parish in which the school board is domiciled.

(c) The provisions of this Paragraph shall not be construed as authority for a school board which has adopted or accomplished reapportionment or is able to reapportion itself using whole precincts to divide precincts. Any plan adopted by a school board in contravention of this Subsection shall be null and void.

(d) The provisions of this Paragraph shall become null and void on December 31, 1992, unless a school board received an objection letter to its reapportionment plan from the Department of Justice. In such event the school board shall use the provisions of this Paragraph to satisfy the objections of the Department of Justice if said objections would require a precinct to be divided and the provisions of this Paragraph shall be null and void after such reapportionment is complete."

22. Nonetheless, it is quite common for parish school boards in Louisiana, even those with the same number of members as their parish police jury, to draw redistricting plans different from the respective police jury redistricting plans. For example, of the nine school board redistricting plans drawn by



plaintiff's expert Gary Joiner in which the school board and police jury had the same number of members, five have different plans. Indeed, Bossier Parish had different redistricting plans for its school board and police jury throughout the 1980s.

23. Moreover, school boards redistricting during the early 1990s were always free to request precinct changes from the Police Jury necessary to accomplish their redistricting goals. In fact, the DeSoto Parish and Vernon Parish School Boards employed this method successfully during their recent redistrictings. Joiner testified at deposition that such a practice "is not unheard of, it has been done in other places."

24. School boards and police juries have different needs and different reasons for redistricting, and thus have legitimate reason for drawing different redistricting plans. For example, police juries are concerned with road maintenance, drainage, and in some cases garbage collection, and the level of demand for such services in each district is a concern. School board members, by contrast, are typically concerned with having a public school or schools in each district. The current (1991) Bossier Parish Police Jury Plan does not have a public school in each district.

25. Louisiana Revised Statutes, Title 17, Section 71.3E(1) and (2) is racially neutral. Its purpose is solely to promote electoral uniformity and stability.[1]

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[1] The Defendant and defendant-intervenors do not dispute this assertion, but maintain that it is irrelevant.

*Bossier Parish Police Jury History and Redistricting Process*

26. Incumbency protection considerations come into play in the redistricting of the Bossier Parish Police Jury, and did so in 1982. Incumbency protection has always been a consideration for the Police Jury. Among the primary redistricting criteria employed by the Police Jury during the 1980s redistricting process were one-person, one-vote considerations and respecting each incumbent's wishes regarding the configuration of his own district. According to Police Juror James Elkins and then-Parish Administrator James Ramsey, incumbency protection also was the reason the Parish Police Jury and School Board chose different redistricting plans in the 1980s.

27. Jerome Darby, who is black, was elected to the Police Jury in 1983. He currently is serving his third term as a Police Juror.

28. The Police Jury has a President and Vice President, who are elected from among the Police Jury members to one-year terms. For at least several decades, it has been the custom that the Vice President ascends to the Presidency upon the vote of the full Police Jury. Police Juror Burford testified at deposition that such a succession is "almost automatic." Even when a sitting President took the rare step of running for reelection to the Presidency, the Police Jury followed the tradition of voting the Vice President into the Presidency. In the last 30 years, every white sitting Vice President eligible to serve as a Police Juror the following year has been elevated to the Presidency.



29. Jerome Darby is the only black Police Juror ever to serve as Vice President. In January 1991, the Police Jury voted not to elevate Darby to the Presidency. This occurred just a few months before the adoption of the 1991 Police Jury redistricting plan.

30. Paul Caplis, a sitting Police Juror at that time, has testified at deposition that Darby was passed over for the Presidency "solely because he was black." Bob Burford, also on the Police Jury at that time, describes the Police Jury vote to deny Darby the Presidency as a "miscarriage of justice" which constituted "failing to recognize him as an equal." Asked why he thought the majority of Police Jurors voted against Darby, Burford replied that, although none of Darby's opponents explicitly told Burford so, Burford "thought it was because he was black." Burford, in fact, has served as President though he has served less time on the Police Jury that Darby. Indeed, every Police Juror elected to office in 1983 or before has become President, except Jerome Darby.

31. There are other indications that the Police Jury operated in an atmosphere of racial prejudice. For example, in response to a deposition question, Police Juror "Pete" Glorioso identified the *Shreveport Times* as the newspaper with the largest circulation in the area; when asked to identify the newspaper read most widely by blacks, he answered, "[A]ny one that they could get free." He further added that "some papers throw away free papers," and that at one time the *Bossier Press* "threw all the free papers to every household."

32. United States Exhibit 1 lists the members of the Bossier Parish Police Jury, and their corresponding districts, at the time of the 1990-1991 redistrict-

ing process. James Elkins was President at that time. Except for Jerome Darby, every Police Juror at that time was white.

33. At the November 13, 1990 meeting of the Bossier Parish Police Jury, the Jury authorized a contract with Gary Joiner of Petroleum Graphics to develop a redistricting plan. Mr. Joiner had been interviewed by Parish Administrator James Ramsey, who had arranged for Joiner to make a presentation to the Police Jury. Ramsey told Joiner that Joiner was required to "work with twelve members" of the Police Jury, by which he meant that Joiner had to be responsive to their concerns. To that end, Ramsey suggested that Joiner begin his work by holding one-on-one meetings with individual Police Jurors, at which each Juror could give Joiner input regarding the changes to be made to his own district.

34. Police Jurors were aware of the black population percentages in the districts under the redistricting plan proposed and adopted in 1991. Under the plan finally adopted, one district (District 7) is 43 percent black in total population, and another (District 4) is 45 percent black.

35. No member of the Police Jury ever asked Gary Joiner if it were possible to adjust district lines in either of those districts to raise the black percentage to a level over 50 percent.

36. At the time of the 1990-1991 redistricting process, some Police Jurors were specifically aware that a contiguous black-majority district could be drawn both in northern Bossier Parish and in Bossier City. At the time of the 1990-1991 redistricting process, it was obvious that a reasonably compact black-majority



district could be drawn within Bossier City. "Contiguous" here means that all units of geography in the district have some common border with some adjacent unit.

37. During the 1990-1991 redistricting process, Police Jurors had a general understanding that the Voting Rights Act requires jurisdictions to create districting plans which fairly reflect black voting strength.

38. During the 1990-1991 redistricting process, Police Jurors were aware that election precincts could be split by district lines for a number of reasons, including (a) compliance with one person, one vote and (b) compliance with the Voting Rights Act. During the 1990-1991 redistricting process, Police Jurors were told by Joiner at public Police Jury meetings that they could split election precinct lines. They also were aware that the plan they adopted in 1991 split precincts. At the April 30, 1991 public Police Jury meeting at which the final redistricting plan was adopted, Gary Joiner told the Police Jury members that "approximately 10" precincts were split in the plan. Precinct realignments are a normal practice within Bossier Parish, occurring every three or four years. Bossier Parish has made a number of such precinct realignments within the last ten years.

39. While one of the redistricting criteria set by the Police Jury during the 1990-1991 redistricting process was the inclusion of minority input, the sole black Police Juror, Jerome Darby, initially was excluded from the Reapportionment Committee. At the December 6, 1990 meeting of the Police Jury's Finance Committee, a Technical Advisory Reapportion-

ment Committee was selected to work with Gary Joiner on redistricting. Given Mr. Joiner's previous emphasis on inclusion of minority input as a redistricting criterion, Police Juror Jerome Darby considered it likely that if the redistricting standards were followed, he, as the sole black Police Juror, would be included on the Committee. Indeed, at that time, Darby had recently attended a reapportionment seminar in Monroe, Louisiana. No member of the committee (other than Joiner) had attended such a seminar.

40. Police Juror Hammack moved that the committee consist of a representative from the District Attorney's office, the Registrar of Voters, the Tax Assessor, Mr. Ramsey (the Parish Administrator), two jurors (Mr. Caplis as the rural representative and Mr. Burford as the city representative) and Mr. Joiner. All of these individuals were white. Upon a vote of ten ayes to one nay, the motion carried. Mr. Darby, the only black member of the Police Jury, voted against the motion. Darby felt personally insulted by his exclusion from the Committee.

41. At the full Police Jury meeting five days later on December 11, 1990, after black Police Juror Darby protested his exclusion from the Committee as a denial of "equal representation," the Police Jury voted to include Darby plus one other Juror, James Elkins, on the Committee. Elkins testified at deposition that he has "no earthly idea" why the Jury voted to respond to Darby's request by placing Elkins, as well as Darby, on the Committee.

42. The following chart reflects the population characteristics as of the 1990 Census of the Police Jury districting plan adopted in the 1980s:



| *District* | *Total Pop.* | *Deviation* | *Black Pop.* | *Black %* |
|---|---|---|---|---|
| 1 | 10,108 | 40.90% | 1,845 | 18.25 |
| 2 | 10,099 | 40.77% | 1,423 | 14.09 |
| 3 | 7,906 | 10.20% | 1,889 | 23.89 |
| 4 | 6,154 | -14.22% | 2,833 | 46.03 |
| 5 | 7,569 | 5.50% | 922 | 12.18 |
| 6 | 10,545 | 46.98% | 954 | 9.04 |
| 7 | 5,278 | -26.43% | 2,749 | 52.04 |
| 8 | 5,776 | -19.49% | 801 | 13.86 |
| 9 | 6,835 | -4.73% | 1,262 | 18.46 |
| 10 | 5,645 | -21.31% | 1,801 | 31.90 |
| 11 | 4,983 | -30.54% | 539 | 10.81 |
| 12 | 5,185 | -27.73% | 363 | 7.00 |

None of the Police Jury districts was majority black in voting age population in 1990. Following the instructions of the Police Jury, Gary Joiner used the 1980s as a starting point for drawing a new redistricting plan. The Police Jury's goal was to change that plan as little as a possible to adjust for population shifts and keep the mean population deviations of the districts below plus or minus five percent. By changing his own district as little as possible, each Police Juror hoped to retain constituents familiar with him, thus maximizing his chances for reelection.

43. Protection of incumbents played a critical role in the 1990-1991 redistricting of the Police Jury. As a general matter, district lines were changed so that they came between the residences of Police Jurors, and incumbency was always a consideration. Incumbency considerations were behind the Police Jury's rejection of the School board's suggestion in 1990 that the bodies hold joint redistricting processes. During the 1990-1991 Police Jury redistricting process, the

boundary between Districts 11 and 12 was deliberately drawn in such a way as to prevent incumbents Hammack and Elkins from residing within the same district. Hammack also asked Police Juror Caplis to agree to change the lines separating their districts so that a potential candidate, Eddie Shell, would be placed in an open district (caused by the retirement of one of the incumbents) rather than in Hammack's district; Caplis agreed to accommodate Hammack, and the change was make. Police Juror Burford's district boundary was deliberately moved across Old Minden Road in Bossier City to ensure that Burford was not placed in the same district with Brad Cummings, a potential opponent. Several Police Jurors discussed election precinct realignments with Voter Registrar William Johnston, but the Police Jurors were most concerned with the configuration of precincts within their own individual districts. The 1991 Police Jury plan protected all incumbents who intended to run for reelection by keeping their residences in separate districts.

44. At the January 15, 1991 meeting of the Bossier Parish Police Jury, Mr. Joiner presented each Police Juror with a questionnaire and asked that each of them complete it, making notations of items to be addressed during reapportionment. He also told the members of his plan to interview each member individually and as a group in several open meetings.

45. Between the January 15, 1991 meeting and the final adoption of the Police Jury plan on April 30, 1991, each of the twelve Police Jurors met with Gary Joiner in Joiner's office to view proposed redistricting plans on Joiner's redistricting computer. Present at each meeting were Joiner and from one to three Police



Jurors. The intent of the meetings was to find out if any incumbents had concerns with their own districts. To that end, Joiner encouraged groups of incumbents who lived in neighboring districts to come to him so that their concerns as incumbents could be worked out together. At these meetings, each Police Juror focused primarily on the configuration of his own district. These meetings with Joiner were not open to the public.

46. The 1990-1991 redistricting process thus took place in two phases. The first was a closed phase in which individual Police Jurors met with Joiner to discuss the plan, and Joiner devised a proposed plan with which all Police Jurors could agree. This phase took place away from public scrutiny. Once the Jurors agreed on a plan, the plan would be shown to the public. Except for some minor changes discussed at a Police Jury meeting on the day the plan was adopted, the plan agreed upon by the Police Jurors during the closed phase of the process was identical to the plan ultimately adopted.

47. Black Police Juror Jerome Darby met once with Joiner in Joiner's office a few weeks before the plan's final passage. By the time Darby met with Joiner, Joiner already had met with almost all the other Jurors and had drawn the proposed plan. Joiner told Darby that, under the proposed plan, there was a possibility for three minority individuals to be elected to the Police Jury. Joiner also told him at that time that the proposed plan was the best that could possibly be drawn for blacks in Bossier Parish, and that it was impossible to draw a black-majority district.

48. During this time period, school board member Tom Myrick also met several times with Joiner in

Joiner's office, accompanied by one or more police jurors. Myrick lives near Benton, in an area close to a heavy concentration of black population. This area would likely be included in any majority-black district to be drawn in the norther part of Bossier Parish.

49. The result of the private meetings with Joiner were maps of proposed redistricting plans which were presented from public review at public meetings held by the Police Jury. The proposed maps were made available for inspection by the public at the Police Jury office, but not until the day of the public meeting. No extra copies of these maps were available for members of the public to take home with them. Joiner stated that the Police Jury's common procedure was to allow members of the public to make their own copies. The map of the proposed plan on display at the public meetings which was ultimately adopted was too large to be copied.

50. These public meetings were held at 2:00 p.m. on weekdays, when many black residents of the parish were at work. Black citizens previously had asked that these Police Jury meetings take place at night, but those requests were not granted.

51. The public meetings were advertised in one newspaper. The Police Jury instructed its staff to place advertisements in the "minority media." The Police Jury, however, placed advertisements only in the *Bossier Tribune*, its usual legal advertiser. *The Bossier Tribune* is not a widely read newspaper in Bossier Parish, and is not part of "minority media."

52. The first public Police Jury meeting to discuss proposed redistricting plans was held on April 8, 1991. Mr. Joiner presented three plans during this meeting.



The data revealed that the ideal population for a Police Jury district is 7,174. None of the plans had a black-majority district. Mr. Joiner represented that the black population was not sufficiently concentrated in the parish to draw even one black-majority district. Mr. Joiner further informed the Police Jury that subdividing precincts would be permissible from April 1, 1991 through May 15, 1991. According to Joiner, the Police Jury likely was previously aware of this fact; the Jury was a member of the statewide Police Jury Association (which lobbied to get this statutory "window" approved) and was thus in "constant communication" with the Baton Rouge election office.

53. At the April 25, 1991 Bossier Parish Police Jury meeting, Gary Joiner presented three plans to the Police Jury. These alternative plans drawn by Joiner were called Plan 5, Plan 8, and Plan 9. A number of members of the black community attended and asked about the creation of a black-majority district. Joiner stated that the wide distribution of blacks in the parish made a black-majority district "statistically impossible." At deposition, Joiner acknowledged that he knew at that time that drawing two black-majority districts within Bossier Parish was "statistically" possible, in that you could create two majority-black districts at a census block level with the correct population, ignoring precinct considerations.

54. Police Jurors responded to questions regarding a black-majority district at the April 25, 1991 meeting. To repeated questions suggesting the possibility of creating a black-majority district, Police Jurors would impatiently snap, "Don't you understand? We already told you it can't be done!", or

words to that effect. Police Juror Glorioso demanded, "Why are you asking for this? You're already being represented adequately!"

55. Black resident Octavia Coleman, on behalf of a number of the black attendees, asked for a copy of the map of Joiner's proposed plan. Joiner said that the display map he had was too large to copy, and that residents would have to come down to the Police Jury office to see it.

56. A number of black attendees asked about the creation of a black-majority district based in the town of Haughton. In response, Joiner pointed out that moving the (heavily black) Princeton area into District 4 (43 percent black under the adopted plan), which includes Plain Dealing, would cause "the problem" that telephone service would be long distance within that district. Under the plan ultimately adopted, however, District 4 includes both Plain Dealing and an area adjacent to the corporate limit of Benton, and telephone service is long distance between these two towns. The Police jury did not explore the subject of a black-majority district any further at the April 25, 1991 meeting. Upon Police Juror Whittington's motion, the Police Jury decided that Plan 9 would be studied further and pursued as a final plan for adoption at the April 30, 1991 meeting.

57. In 1991, there was no legal impediment to the drawing of black-majority districts in the Bossier Parish Police Jury redistricting plan.

58. At the April 30, 1991 meeting of the Bossier Parish Police Jury, Mr. Joiner presented "Plan 9" to the members. Mr. Joiner made two changes to Plan 9 after the April 25, 1991 meeting. Neither of the



changes were in response to the concerns raised by black residents at prior meetings, nor were they made to increase electoral opportunities for black voters in the parish. The Police Jury minutes reflect that the 1990 Census population statistics for Plan 9 are:

| *District* | *Total Pop.* | *Deviation* | *Black Pop.* | *Black %* |
|---|---|---|---|---|
| 1 | 7,372 | 2% | 2,056 | 27.89 |
| 2 | 7,484 | 4% | 737 | 9.85 |
| 3 | 6,847 | -4% | 1,728 | 25.24 |
| 4 | 6,949 | -3% | 3,122 | 44.93 |
| 5 | 7,561 | 5% | 734 | 9.71 |
| 6 | 7,444 | 3% | 274 | 3.68 |
| 7 | 6,992 | -2% | 3,068 | 43.88 |
| 8 | 6,899 | -3% | 1,471 | 21.32 |
| 9 | 7,219 | 0% | 1,000 | 13.85 |
| 10 | 7,452 | 3% | 2,004 | 26.89 |
| 11 | 7,019 | -2% | 504 | 7.18 |
| 12 | 6,850 | -4% | 603 | 8.80 |

However, Joiner testified at deposition that the actual figures are different, and that the total deviation range of Plan 9 as ultimately adopted by the Police Jury is 11.75 percent.

59. The plan submitted by the Bossier Parish Police Jury to the Justice Department for preclearance was as follows:[2]

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[2] The plan submitted by the Police Jury to the Justice Department differed slightly from the Plan reflected in the April 30, 1991 Police Jury minutes. The differences are not material to this case.

| *District* | *Total Pop.* | *Deviation* | *Black Pop.* | *Black %* |
|---|---|---|---|---|
| 1 | 7,187 | 0.18% | 2,069 | 28.8 |
| 2 | 7,429 | 3.55% | 728 | 9.8 |
| 3 | 6,856 | -4.43% | 1,737 | 25.3 |
| 4 | 6,903 | -3.78% | 3,120 | 45.2 |
| 5 | 7,607 | 6.04% | 734 | 9.6 |
| 6 | 7,444 | 3.76% | 274 | 3.7 |
| 7 | 6,992 | -2.54% | 3,068 | 43.9 |
| 8 | 6,899 | -3.83% | 1,471 | 21.3 |
| 9 | 7,219 | 0.63% | 1,080 | 15.0 |
| 10 | 7,452 | 3.88% | 2,004 | 26.9 |
| 11 | 7,019 | -2.16% | 504 | 7.2 |
| 12 | 7,081 | -1.30% | 592 | 8.4 |

60. Precinct lines also were discussed at the April 30, 1991 meeting. Joiner informed the Police Jury that the proposed final plan, through splitting existing precincts, created 13 new voting precincts and thus increased administrative costs for elections. Joiner had discussed the number of precinct cuts occasioned by his proposed plans earlier in the redistricting process.

61. At the April 30 meeting, however, Joiner also informed them that precinct changes could be made after January 1, 1993 so as to consolidate some precincts and thus reduce administrative costs. In fact, according to Joiner, in his private meetings with Police Jurors, and with School Board member Myrick, the redistricting was discussed "in the hopes of consolidating" precincts, and the Bossier Parish Police Jury is at the present time considering implementing such consolidations. This anticipation of consolidating precincts as soon as practicable existed throughout the Police Jury redistricting process.



62. At this time, it was also Joiner's understanding that even before January 1, 1993, administrative costs could be reduced by placing the machines and poll workers of two precincts at one polling place. This would reduce the number of poll workers which would need to be hired by the parish.

63. After about 30 minutes of discussion before the public, the Police Jury cut off discussion to retire into executive session. After returning from executive session, upon Mr. Caplis' motion, Plan 9 was adopted with one abstention (unrelated to racial concerns), and the Police Jury authorized the preparation of the plan for submission to the Department of Justice for Section 5 review.

64. Mr. Darby explains that he voted for the redistricting plan because he was led to believe by Mr. Joiner and the other Police Jurors that it was impossible to create a black-majority district that would receive Section 5 preclearance from the Department of Justice. That was his understanding at the time of the 1990-1991 redistricting process and the subsequent 1991 Section 5 preclearance review by the Department of Justice. Having since been shown that it was at that time possible to have drawn *two* reasonably compact majority-black districts, Darby has reversed his position and now believes that he was deliberately misled in this regard during the 1990-1991 redistricting process. But for these misrepresentations, he would have voted against the plan finally adopted by the Police Jury.

65. On April 30, 1991, the Police Jury received a letter from the Concerned Citizens of Bossier Parish, a black organization, protesting the lack of openness in the redistricting process. The letter alleged that

black citizens were denied information regarding the redistricting which they had requested from the Police Jury. The letter also protested the Police Jury's decision to go into executive session to discuss redistricting at a public Police Jury meeting. Black residents state that at the April 30, 1991 Police Jury meeting, black residents specifically asked that the letter be placed in the Parish's Section 5 submission to the Department of Justice.

66. Police Juror James Elkins, Parish Administrator James Ramsey, and Gary Joiner were among those responsible for making the Section 5 submission to the Justice Department. Though Joiner played a role, the submission was mailed from the courthouse. Police Juror Burford testified at deposition that as a rule, the Police Jury was "very, very careful to keep correspondence" it received. Parish officials involved in the redistricting process, including Police Juror Burford, acknowledged that the April 30, 1991 Concerned Citizens letter normally would have been included with the submission. The April 30, 1991 letter was not included with the submission sent by he Police Jury.

67. At the May 14, 1991 Bossier Parish Police Jury meeting, Mr. Darby referred to the April 30 Concerned Citizens letter regarding reapportionment procedures.

68. The Police Jury sent its Section 5 submission of the 1991 redistricting plan to the Department of Justice on May 22, 1991. The Department of Justice received the Bossier Parish Police Jury redistricting plan on May 28, 1991. Additional information was received by the Department on July 19, 1991. In a July 29, 1991 letter from John R. Dunne, Assistant Attorney General for Civil Rights, to Mr. James Ramsey, Mr. Dunne informed the Police Jury that the Attorney General did not interpose any objection to the 1991 Police Jury redistricting plan.



69. During the course of the 1990-1991 redistricting process, some Police Jurors rejected the idea of drawing any black-majority districts in the 1991 redistricting plan. The reasons given by Police Jurors for this rejection vary. Police Juror Burford testified at deposition that among other things, he felt it would be desirable to have Jerome Darby continue on the Jury as a black member elected from a white-majority district, and to maintain a number of other white-majority districts with sizeable black populations, but to avoid the creation of a district with a black-majority. Police Juror Glorioso testified that the Police Jury never seriously considered the idea of creating a black-majority district because there was already one black person sitting on the Jury.

70. While some Police Jurors testified at deposition that a plan containing a black-majority district would have crossed too many precinct lines, thereby creating new precincts and raising election costs, the Police Jurors have been told by Joiner at the April 30, 1991 meeting that the plan they were adopting in 1991 created at least ten new precincts, and thus raised election costs. Actually, 20 new precincts were created when the 1991 Police Jury plan was drawn. Moreover, at the time of the adoption of the 1991 plan, Police Jurors did not know and did not seek to learn the number of precincts that would have to be split to create a black-majority district. Joiner never informed the Police Jury of an exact number of additional split precincts that would be caused by drawing

a black-majority district, and no Police Juror ever asked for this information. To Joiner's knowledge, the Police Jury never gave him a maximum number of precinct splits they deemed acceptable. The plan ultimately adopted by the Police Jury was not the redistricting alternative with the lowest number of splits.

71. Joiner testified at deposition that any factors arguing against the creating of a majority-black district "would be lumped under" the general category of concerns regarding the splitting of precincts.

72. Several Police Jurors testified at deposition that a black-majority district would contain unacceptably narrow or otherwise oddly-shaped lines. They claimed to base this conclusion on their examination of black population concentrations within the parish on Gary Joiner's computer, or on their own personal knowledge of black concentrations within the parish. Police Juror Burford testified that Joiner did not show him anything to support this conclusion. According to the deposition testimony of Police Jurors involved in the process, at no time during the 1990-1991 redistricting process did any Police Juror see a map of a black-majority district showing the actual boundary lines of such a district. No parish official who testified has any knowledge that Mr. Joiner ever drew such a district, nor that any Police Juror ever asked him to attempt to do so. Further, at least some Police Jurors acknowledged that any such concerns relating to shape would not apply to a black-majority district contained within Bossier City.

73. Several Police Jurors admit that it was not their understanding at the time of the 1990-1991 re-



districting that there was anything potentially illegal about drawing oddly-shaped black-majority districts.

74. Police Juror Burford admitted that if a district in the Police Jury plan ultimately adopted was in his view oddly-shaped, that he would "have a problem" with it only if it were drawn specifically to achieve a particular racial proportion.

75. Former Parish Administrator Ramsey testified at deposition that a black-majority district in the northern part of the parish would have to include Benton and Plain Dealing, which are too different to be joined, and whose black communities would oppose being combined into a district. Ramsey testified that neither he nor any of the Police Jurors ever asked the black communities of either of those two towns whether they would oppose being combined into a single district; that black citizens inquiring at Police Jury meetings about black-majority districts were not asked about this point; and that he really did not know if black persons in either of those two towns would prefer a plan with all white-majority districts over being combined into a single district. Even if this truly had been a concern, it would of course be inapplicable to a black-majority district within Bossier City.

76. The plan ultimately adopted contains a (white-majority) northern parish district which includes Benton and Plain Dealing. Former Parish Administrator James Ramsey testified that this created a "bad situation" for the Juror representing the district.

77. One Police Juror testified at deposition that a black-majority district in Bossier Parish would have

had to be 30 miles in length, which would be unacceptably long. The Police Jurors were aware at the time of redistricting that the current (1991) Police Jury plan contained a white-majority district which was approximately 30 miles long. The district in question was further elongated as a result of negotiations among several of the Police Jury incumbents. The elongation was designed to ensure an incumbent's reelection. Police Jurors were aware that a black-majority district contained within Bossier City would be considerably shorter than 30 miles long.

78. The plaintiff's expert felt that it was unlikely that the Police Jury could have drawn two black-majority districts in Bossier Parish while still protecting all incumbents who were running for reelection.

79. At the November 9, 1993 public Police Jury meeting, George Price, representing the local NAACP chapter, called for the Bossier Parish Police Jury and School Board "to publicly meet and develop a redistricting plan that will increase the number of minorities on these boards and that more accurately reflect the make-up of this parish." Price also called upon the police jury to "seize" the opportunity to "assign and employ more blacks throughout the parish." Price had previously sent a letter to the Police Jury on October 7, 1993 which included the concern that the 1991 Police Jury redistricting plan did not reflect "the make-up of our parish." Once the idea of redrawing the police jury districts was presented, the Police Jury dismissed it real quickly. On January 11, 1994, the Police Jury passed unanimously a motion to make public the Police Jury's intention to maintain its current district lines. This



was the only Police Jury meeting at which the Police Jury passed such a resolution.

*Bossier Parish School Board Redistricting Process*

80. In 1992 the Bossier Parish School Board undertook its obligation to present a redistricting plan for preclearance. It hired Mr. Gary Joiner to assist in the effort. Mr. Joiner met with the Board and explained what he perceived to be the requirements of the Voting Rights Act of 1965. In the course of his explanation, he told the board about the Police Jury plan and told the Board that because the Police Jury and the School Board were the same size and because both used twelve single-member districts the adoption of the Police Jury plan was a viable option. He also told the Board that the Police Jury plan had been precleared and that the same plan from the School Board would unquestionably get preclearance as well. Mr. James Bullers, Bossier Parish District Attorney and legal counsel for the Board, concurred in that opinion.

81. The Bossier Parish School Board adopted a different plan from the Police Jury for the 1980s due to incumbency protection considerations.

82. The Bossier Parish School Board districts in effect during the 1980s were malapportioned after the 1990 Census. The district population figures after the 1990 Census were:

| *District* | *Total Pop.* | *Deviation* | *Black Pop.* | *Black %* |
|---|---|---|---|---|
| 1 | 9,233 | 28.71% | 1,230 | 13.32 |
| 2 | 7,889 | 9.97% | 1,291 | 16.36 |
| 3 | 13,598 | 89.56% | 1,501 | 11.04 |
| 4 | 6,552 | -8.66% | 3,055 | 46.63 |
| 5 | 6,498 | -9.42% | 962 | 14.80 |
| 6 | 7,963 | 11.00% | 1,579 | 19.83 |
| 7 | 5,867 | -18.21% | 2,569 | 43.79 |
| 8 | 6,516 | -9.17% | 1,149 | 17.63 |
| 9 | 6,229 | -13.17% | 1,374 | 22.06 |
| 10 | 6,054 | -15.61% | 1,824 | 30.13 |
| 11 | 4,085 | -43.05% | 460 | 11.26 |
| 12 | 5,604 | -21.88% | 387 | 6.91 |

83. The School Board was not under the same time constraints to redistrict as the police jury following the availability of the 1990 Census. The next scheduled School Board elections were not until October 1994. At the October 18, 1990 meeting of the Bossier Parish School Board, the School Board unanimously voted to authorize Dr. Peterson to "convey to the police jury that the School Board would agree to work with a professional demographer to hopefully end with the same geographical boundary lines."

84. The Police Jury was not interested in pursuing the redistricting process jointly with the School Board because of incumbency protection considerations.

85. One School Board member, Tom Myrick, did participate in the Police Jury redistricting process. Myrick met with Joiner, who drew the Police Jury plan, some five times during the Police Jury process. On these occasions, Myrick was accompanied by at least two of the Police Jury members, Rick Avery and



Tommy Scarborough, all of whom represent districts, portions of which could be used to create a black-majority district north of Bossier City. Myrick was only concerned with the configuration of his own district. Joiner gave Myrick a map of the Police Jury plan at that time.

86. The School Board took up the subject of redistricting again at its May 2, 1991 meeting. The Police Jury had just adopted its plan on April 30, 1991, and Joiner attended the meeting at the invitation of the Superintendent of Schools, W.T. Lewis. Joiner discussed the demographic changes in the parish since the 1980s redistricting. Joiner also discussed the concentrations of black population of the parish. Joiner stated that while in the future some majority-black School Board districts could be created, at that time there were no concentrations of black population heavy enough to create a majority-black district. Joiner further explained that, unlike the Police Jury, the School Board had more than adequate time to draw its districts since members would not run in the new districts until 1994. By unanimous vote, the Board engaged Mr. Joiner for the redistricting project, which Joiner estimated would take 200 to 250 hours.

87. Joiner's estate of his time included developing alternative plans, and School Board members considered drawing a plan different from the Police Jury at the start of the process. No member of the all white School Board expressed interest in drawing black-majority districts. The discussions about drawing a plan different from the Police Jury plan focused on concerns about equalizing population among the districts and not on achieving a racial balance.

88. The Board did not give any specific redistricting criteria to Joiner other than to draw a plan that meets all the legal requirements. Joiner never used school attendance zones for the purpose of drawing a map. The idea of keeping "communities" together was not specifically stated to Joiner as a criterion for redistricting.

89. At the September 5, 1991 Bossier Parish School Board meeting, Joiner distributed configuration maps of the new precincts for the Bossier Parish Police Jury, which had been precleared by the Justice Department on July 29, 1991, along with the police jury redistricting plan. Joiner told the School Board members that he provided the precinct maps because they would have to work with the Police Jury to alter the precinct lines. The School Board could not itself alter these precinct lines and that would limit its redistricting options. Joiner also said he planned on meeting with School Board members in small groups to develop a plan that would meet Department of Justice approval.

90. At this point, Board member Tom Myrick suggested adopting the Police Jury plan.

91. The Police Jury plan did not pair Myrick with another School Board incumbent or announced School Board candidate, and placed Myrick in a white-majority district. Myrick lives in the area which would be included in the northern parish black-majority district under the various alternative plans.

92. Following the October 17, 1991 School Board meeting, Joiner distributed maps to the Board illustrating the relationship of the present Bossier Parish School Board districts to the districts approved by



the Bossier Parish Police Jury, so that School Board members could see how their present districts would be affected if they adopted the police jury plan. No other alternative plans were discussed at this time. The School Board members gave no consideration at this time to the creation of a minority voting district.

93. By the spring of 1992, it had come to the attention of the local chapter of the NAACP that the School Board was in the planning stages of the reapportionment of School Board districts. On March 25, 1992, George Price, as President of the local chapter of the NAACP, wrote to Superintendent Lewis requesting that, in light of the fact that there were no minorities on the Board, the NAACP wished to be included in all phases of the redistricting process. Price's letter was distributed to the members of the Board. The Board did not respond to Price's letter and took no action to include the NAACP in the redistricting process.

94. After hearing no response from the School Board, Price wrote again to Superintendent Lewis on August 17, 1992, to request that the Bossier Parish Branch of the NAACP be allowed to come before the Bossier Parish School Board and present their views on the redistricting. Price also stated that the NAACP would oppose any plan that, like the police jury plan, diluted minority voting strength.

95. At the August 20, 1992 meeting of the Bossier Parish School Board, Price, representing the NAACP, addressed the Board regarding immediate concerns that affect blacks in the Bossier Parish School system. At this meeting, Price presented the board with nine proposals: 1) the appointment of a black to fill the current vacancy on the Board; 2)

development of an early recruitment program for black teachers; 3) diligence in recruiting, hiring, retaining, and promoting blacks; 4) offering alternative certification to liberal arts majors; 5) development of a reassignment and transfer program to insure parity or equalization of minorities at all schools; 6) organizing a recruitment program with predominately black colleges; 7) encouraging Parish graduates to pursue education as a major and return to Bossier to work and live; 8) encouraging the Superintendent and Board to be actively involved in all communities; and 9) guaranteeing participation of every Parish citizen in reapportionment of School Board districts. No specific action was taken by the school Board in response to Price's presentation.

96. At some point during the school Board redistricting process, Joiner met with the School Board members with his computer at a time other than a regularly scheduled Board meeting. While all of the School Board members remember the meeting, no one remembers the date. Board member Barry Musgrove believes the meeting occurred in August of 1992. No School Board meeting minutes reflect such a meeting, and there was no notice to the public of the meeting. At this meeting, Joiner had his computer set up and individual members or groups of members gathered around him as he demonstrated alternative redistricting plans or "scenarios" for creating districts. This is the only time that the Board was shown alternative "scenarios."

97. Despite the NAACP's repeated requests to participate in the redistricting process, it was not given notice of such a meeting and thus did not attend. In considering the adoption of a redistricting plan and



after listening to the comments of concerned citizens, the school board consulted only with its attorney and cartographer and did not consult with any special interest group or racial organization, either white or black.

98. Frustrated by the School Board's lack of responsiveness to his request to become part of the redistricting process, Price contacted the NAACP Redistricting Project in Baltimore in the summer of 1992. The Project developed a partial plan for Price to present to the School Board that consisted of two districts which reflected the black voting strength in Bossier Parish. The NAACP alternative plan distributed the population in those two district as follows:

| *District* | *Total Pop.* | *Deviation* | *Black Pop.* | *Black VAP* |
|---|---|---|---|---|
| 1 | 6,913 | -3.6% | 56.8% | 50.6% |
| 2 | 6,854 | -4.5% | 62.6% | 58.9% |

99. The NAACP did not draw a complete plan because they were most interested in demonstrating ways to more fairly reflect black voting strength and did not want to raise issues as to the other districts: the School Board was free to draw them in any way they chose. When Price showed this plan to a school district official, he was told that the plan was unacceptable and that he would need to come up with a plan that contained all twelve districts. Price relayed this information back to the NAACP Redistricting Project, which then drew a plan for all twelve districts.

100. At the September 3, 1992 meeting of the Bossier Parish School Board, Mr. Price, speaking for the NAACP, Men's Club of Bossier, Voter's League,

Concerned Citizens, Bossier Housing Tenant Coalition and the Concerned Parents of Plain Dealing, presented a map of all twelve districts and made a statement on behalf of the NAACP. Price stated that black-majority districts could be created for the Bossier Parish School Board. The School Board members stated that they would need to see a bigger map before they would analyze it. The NAACP alternative plan distributed the population as follows:

| *District* | *Total Pop.* | *Deviation* | *Black Pop.* | *Black %* |
|---|---|---|---|---|
| 1 | 6,874 | -4.18% | 3,908 | 56.85 |
| 2 | 6,875 | -4.17% | 4,311 | 62.71 |
| 3 | 6,886 | -4.01% | 2,595 | 37.69 |
| 4 | 7,289 | 1.60% | 645 | 8.85 |
| 5 | 7,002 | -2.40% | 522 | 7.46 |
| 6 | 7,188 | 0.20% | 1,000 | 13.91 |
| 7 | 6,823 | -4.89% | 555 | 8.13 |
| 8 | 7,457 | 3.94% | 950 | 12.74 |
| 9 | 7,427 | 3.53% | 584 | 7.86 |
| 10 | 7,414 | 3.35% | 1,116 | 15.05 |
| 11 | 7,395 | 3.08% | 514 | 6.95 |
| 12 | 7,458 | 3.96% | 601 | 8.06 |

101. District 3 contained Barksdale Air Force Base. One census block constituting most or all of the base contains 3,327 people. Most of these people are not registered to vote in Bossier Parish. The distribution of the population in District 3 without the census block which includes the military based is:

| *District* | *Total Pop.* | *Black Pop.* | *Black VAP* |
|---|---|---|---|
| 3 | 3,559 | 53.5% | 51.0% |



102. Both Gary Joiner and Parish District Attorney James Bullers were present at the meeting. Both summarily dismissed the NAACP plan. The stated reasons for their dismissal was that the plan's district lines crossed existing precinct lines, and therefore violated state law. Joiner and Bullers were aware of the option of obtaining precinct line changes from the police jury.

103. At the September 17, 1992 School Board meeting, Jerome Blunt was sworn in as the first black person to serve on the School Board. Blunt was appointed by a vote of 6-5 by the School Board following a resignation. The NAACP had lobbied the School Board for the appointment of black person.

104. The narrow vote in favor of Blunt's appointment was contemporaneous with the 1992 School Board redistricting process. Board member Michelle Rodgers testified at deposition that three white constituents called her to express bitter opposition to Blunt's appointment. These constitutes charged that Rodgers supported him only because he was black, and that she had "bowed down" to the NAACP.

105. Blunt served in the office only six months. Blunt was defeated in a special election by a white candidate, Juanita Jackson. The district in which he ran was 11 percent black in population, according to the 1990 Census.

106. At the September 17, 1992 Bossier Parish School Board meeting, Price, speaking for the NAACP, Men's Club of Bossier, Voter's League, Concerned Citizens, Bossier Housing Tenant Coalition and the Concerned Parents of Plain Dealing, again presented for consideration the redistricting

plan developed by the NAACP. Also at the September 17, 1992 Bossier Parish School Board meeting, the School Board unanimously passed a motion of intent to adopt the Police Jury plan. It was announced that the plan would be on display, a public meeting would be held on September 24, 1992 and final action would be taken at the October 1, 1992 School Board meeting. The board did not direct Joiner to conduct any further study of the NAACP plan. The Board did not delay any further action on the adoption of the Police Jury plan until Joiner had more time to study the NAACP plan, despite the fact that Joiner had previously told the School Board that there was no reason for haste, because the next School Board election was in October 1994.

107. Blunt did not participate in any discussion about the redistricting process. In his opinion, the board had already made up its mind to adopt the Police Jury plan by the time he took office.

108. A public hearing was held on September 24, 1992. All of the members of the Board were present except Susan Barrera and Boyce Hensley, District Attorney Bullers was also present. Forty people registered their attendance, although the room, which has a capacity of 75 persons, was overflowing. Fifteen people, the majority of whom were black, addressed the Board. All black residents voiced their opposition to the School Board's adoption of the police jury plan because, they alleged, it diluted black minority voting strength. Price, as the President of the NAACP, presented a petition which contained over five hundred signatures, constituting the largest petition received by the School Board since at least 1990. Price requested that the School Board give the plan developed



by the NAACP its utmost consideration and that it be used as a foundation for the creation of three districts that increase the possibility of blacks to be elected to the School Board. Price also admonished the School Board to be cautious about abdicating its responsibility to Gary Joiner, who is not a lawyer. Price advised the board of the supremacy clause of the United States Constitution and that the state law governing precinct alterations could not supersede compliance with the Voting Rights Act. He also stated that the Justice Department's preclearance of the Police Jury plan in 1991 did not preclude an objection to the School Board's adoption of the plan in light of the submission of the NAACP plan to the Board which demonstrated that it was possible to draw a plan that did not dilute minority voting strength. He also told the Board that the fact that the Police Jury plan was precleared did not immunize the Police Jury or the School board if they adopted the plan from litigation under Section 2 of the Voting Rights Act.

109. At the October 1, 1992 School Board meeting, the Bossier Parish School Board passed a resolution adopting the Police Jury plan. The vote was 10 ayes, 1 abstention and 1 absent. Jerome Blunt, the School Board's only black member, abstained. Blunt abstained because he felt that by abstaining, he would draw more attention to the fact that the plan diluted black voting strength. Barbara W. Gray was absent. The plan adopted has two districts in which incumbents are pitted against each other and two districts in which no incumbents reside. The population figures for the adopted plan are:

| *District* | *Total Pop.* | *Deviation* | *Black Pop.* | *Black %* |
|---|---|---|---|---|
| 1 | 7,187 | 0.18% | 2,069 | 28.79 |
| 2 | 7,429 | 3.55% | 728 | 9.80 |
| 3 | 6,856 | -4.43% | 1,737 | 25.34 |
| 4 | 6,903 | -3.78% | 3,120 | 45.20 |
| 5 | 7,607 | 6.04% | 734 | 9.65 |
| 6 | 7,444 | 3.76% | 274 | 3.68 |
| 7 | 6,992 | -2.54% | 3,068 | 43.88 |
| 8 | 6,899 | -3.83% | 1,471 | 21.32 |
| 9 | 7,219 | 0.63% | 1,080 | 14.96 |
| 10 | 7,452 | 3.88% | 2,004 | 26.89 |
| 11 | 7,019 | -2.16% | 504 | 7.18 |
| 12 | 7,081 | -1.30% | 592 | 8.36 |

110. The School Board proceeded to adopt its final plan on October 1, 1992. The plan was not submitted to the Justice Department for preclearance until January 4, 1993.

111. In its order of October 1, 1970, modifying the April 29, 1970 decree, the court in *Lemon v. Bossier Parish School Board*, C.A. No. 10.687 (W.D. La), a school desegregation case, mandated the establishment of a Bi-Racial Advisory Review Committee. The committee was to be comprised of an equal number of back and white members. The purpose of the committee was to "recommend to the School Board ways to attain and maintain a unitary system and to improve education in the parish." The court directed the school board to supply the committee with information requested by the committee.

112. The establishment of a Bi-Racial Committee to "analyze and make recommendations as to whether or not the present desegregation plan is to be reviewed, and if so, how," was also incorporated into the



consent decree on April 12, 1976, in the *Lemon* case. The Committee, however, met only two or three times, and only the black members of the Committee attended. The Committee never met again after the first scheduled meetings in 1976.

113. Shortly after the School board's redistricting plan was submitted to the Justice Department for Section 5 review, another committee, this time called the "Community Affairs Committee," was formed at the request of the black community. The committee held its first meeting on January 26, 1993.

114. It was originally the Board's intent to use the Community Affairs Committee to satisfy its requirement under the 1976 consent decree in the *Lemon* school desegregation case, to have a "Bi-Racial Committee." Pursuant to the Consent Decree, the bi-Racial Committee was "charged with the responsibility of investigating, consulting and advising the court and school board periodically with respect to all matters pertinent to the retention of a unitary school system."

115. One of the purposes of the committee was to address the concerns of the black community. The concerns involved the following goals: 1) develop and maintain an early recruiting program, starting at least at the sophomore level of college, and include lay persons from the community in this process; 2) demonstrate diligence in recruiting, hiring, retaining, and promoting African Americans in the Bossier Parish School System; 3) develop a reassignment and transfer program designed to insure parity or equalization of minorities at all schools; (Elementary, Middle, and High) so that black children can see people from their ethnic background working as profession-

als; 4) organize and maintain a recruitment program with Grambling State, Southern University, Xavier University, and Dillard University to increase numerically the number of black teachers in the Bossier Parish School System; 5) establish and maintain a tracking system of Bossier Parish graduates so as to counsel and encourage as many as possible to pursue education as a major, and to return to Bossier Parish to work and live; and 6) encourage the Superintendent and each School Board member to become actively involved in all communities, and to bring and receive information calculated to improve the Bossier Parish School System on behalf of all citizens.

116. The School board disbanded the Committee after three months. Board member Musgrove stated that the reason the committee was disbanded was because, "the tone of the committee made up of the minority members of the committee quickly turned toward becoming involved in policy."

117. This action created strong resentment on the part of the black community. On July 14, 1993, a coalition of black groups, including the NAACP, Concerned Citizens of Bossier Parish, the Men's Club of Bossier, and the Voting League of Bossier Parish, sent a letter to the Board requesting a response as to the steps the Board planned to take regarding the following concerns: 1) the establishment of a community advisory group which would supply input to the School Board concerning educational matters; 2) recruitment and placement of black teachers and administrators in the Bossier Parish School System; 3) plans to address the low math/science scores of black children and to provide scores of Bossier Parish students, along racial lines; 4) the



updated status of the Bossier Parish School Board Redistricting Plan; 5) the need to establish a committee to study the possibility of including a black history year round program in the Bossier Parish School System; 6) the need to provide the policy and procedure for bidding on contractual services provided to the School system; and 7) the need to provide a list of recent contractors that have completed work for the Bossier Parish School System.

118. On March 5, 1993, the Justice Department acting pursuant to its responsibilities under Section 5 of the Voting Rights Act, issued a timely request for additional information concerning the Bossier Parish School Board's redistricting plan. The school board provided additional information.

119. On August 30, 1993, the Attorney General interposed a timely objection to the 1992 redistricting plan for the election of Bossier Parish School Board members. The letter informed the School Board that while the Justice Department was aware that it precleared the identical redistricting plan for the Bossier Parish Police Jury districts in 1991, it had taken into account "new information," particularly the 1991 Police Jury elections held under the 1991 redistricting plan and the 1992 redistricting process for the School Board. An alternative plan which demonstrated "that black residents are sufficiently numerous and geographically compact so as to constitute a majority in two single-member districts" and which was preferred by members of the black community was rejected by the School Board and the Board "engaged in no efforts to accommodate the requests of the black community." The letter further acknowledged that while "the School Board is not required by

Section 5 to adopt any particular plan, it is not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice." The Attorney General also rejected the School Board's argument that state law preventing splitting of precincts precludes adoption of a redistricting plan with majority-black districts, noting that state law allows Police Juries to realign precincts.

120. At the September 3, 1993 School Board meeting, in executive session, the Board discussed its options in light of the Attorney General's objection. All of the School Board members had been given copies of the objection letter. The Attorney General's letter articulated the reasons for the objection and specifically pointed out the Board's option of consulting with the Police Jury in an attempt to change precinct lines to allow the drawing of a plan which fairly reflects minority voting strength.

121. There was no discussion of precinct realignment or conducting a further study of the potential to draw black-majority districts. The Board voted unanimously at that meeting to ask the Justice Department to reconsider the objection.

122. In a letter dated September 3, 1993, District Attorney Bullers requested reconsideration of the objection.

123. At the September 16, 1993 School Board meeting, NAACP President Price again addressed the board representing a coalition of black organizations, and requested that the School Board reconsider its decision to ask the Justice Department to withdraw the objection, because the Police Jury plan adopted by



the Board diluted black voting strength. The Board never responded to Price's suggestion.

124. Price again appeared before the School Board on November 18, 1993 to discuss the concerns that had been raised by the black community in its letter of July 14, 1993 and to which the School Board had failed to respond. School Board member Musgrove admitted that there is a need for a better relationship between the Board and the minority community.

125. In a letter dated December 20, 1993, the Attorney General denied the Bossier Parish School Board's request for reconsideration of the objection. The letter concluded that "given the apparent pattern of racially polarized voting in parish elections, black voters will be unable to elect a candidate of their choice to the school board under the objected-to redistricting plan." The letter also referenced the failure of the School Board "to accommodate the request of the black community that the board develop a plan with two black-majority districts." The letter also noted that, despite the fact the original August 30, 1993 objection letter noted that "the school board could have, but did not, seek a realignment of voting precincts by the Bossier Parish Police Jury that would have facilitated the development of a plan that fairly reflects black voting strength," the School Board made no attempt at this potential solution to its state law concerns. The letter noted the School Board's argument, made for the first time in its request for reconsideration, that under *Shaw v. Reno*, 113 S. Ct. 2816 (1993), the NAACP plan "is 'so irrational on its face that the plan could be understood only as an effort to segregate voters into separate voting districts because of their race.'" The letter

stated, however, that the Board provided no explanation or basis for this conclusion. "Moreover, the Board does not appear to dispute the fact that black residents are sufficiently numerous and geographically compact in the parish so that two black-majority districts could be created. You contend only that it is not possible to do so given current precinct configurations." Accordingly, the School Board's reliance on *Shaw v. Reno*, was deemed "pretextual."

126. Following the January 20, 1994, School Board meeting, at the request of Board member Barry Musgrove, the School Board requested that Gary Joiner review the redistricting plan to see if there was any possibility that he may have missed any alternative configurations.

127. At the March 17, 1994, School Board meeting, Price inquired into the status of Joiner's progress at developing alternative proposals. In a letter dated March 18, 1994, District Attorney Bullers requested from Joiner a report regarding the status of his attempts to develop alternative redistricting proposals. No School Board member has ever requested that Joiner produce maps or otherwise demonstrate any of his attempts to draw black-majority districts for the Bossier Parish School Board.

128. At no time during the redistricting process, including up to the present time, did the Bossier Parish School Board or any other representative of the School Board ever direct Gary Joiner to approach the Police Jury to request that the precinct lines be redrawn to enable the creation of majority-black School Board districts.



*Geographic Compactness and Analysis of Alternative Plans*

129. Dr. George Castille is qualified as an expert in Louisiana geography. He is competent to analyze maps and accompanying statistics and to testify to that analysis.

130. William S. Cooper is qualified as an expert in redistricting and geographic information system software as it relates to redistricting. He is competent to draw and analyze maps, to analyze accompanying statistics, and to testify to that analysis.

131. The boundary markers used in the 1992 Bossier Parish School Board redistricting plan are roads, streams, railroads, and corporate limit lines. Within Bossier City, the School Board's plan also uses the limits of Barksdale Air Force Base.

132. The use of corporate limit lines as election district boundaries is problematic, in that corporate limits are usually arbitrary, and often divide racial concentrations or other communities of interest. This division can occur when corporate lines are not revised frequently enough to accommodate urban growth. It can also occur as a result of selective, discriminatory policies regarding annexation and deannexation. People can have common interests for redistricting purposes even though they are split by corporate boundaries.

133. One factor to be avoided in redistricting is "fracturing," defined by plaintiff's expert Gary Joiner as drawing boundary lines to divide a "population that has a traditional cohesiveness, lives in the same general area, [and] has a lot of commonalities," where this division is effected with "a purposeful intent to

splinter . . . to fracture that population into adjoining white districts."

134. Among the considerations in determining "commonalities" within a district (or between two areas) are socioeconomic commonalities among the residents thereof.

135. Black persons in Benton and in Plain Dealing have some commonalities of interest.

136. The community of Benton has expanded outside the corporate limits in several areas, and the corporate limits fragment those black neighborhoods that straddle the corporate line. By following the corporate limits, the proposed plan's district boundary lines fragment black neighborhoods, splitting them between Districts 3 and 4. One cluster of black families lives along Shaffers Road on the east side of Benton, and a large black subdivision has developed along Highway 162 just north of the Benton Community Club Cemetery. Another group of black residents is located immediately north of the Benton corporate limits at the end of Second Street.

137. In the school board's proposed plan, the area within Bossier City bounded by Shaver, Beckett, Fuller and McArthur Streets is included within District 8 rather that District 7 located immediately to the west. The boundary used, a railroad track, separates this neighborhood from a larger black residential area on the District 7 side of the line. A nearby road could have been used as the boundary marker, keeping the two adjacent communities together.

138. Plaintiff's expert Gary Joiner testified at deposition that though he could not be certain without



further inquiry, this boundary line "appears to be an example of fracturing." Joiner also testified that it is likely that there are "numerous options" available to avoid this instance of fracturing short of causing another precinct split.

139. Plaintiff's expert Gary Joiner employs, as a standard part of his redistricting mapping work, one test for compactness: the "Swartzburg major-minor axis test." This test is run on Joiner's computer. Joiner ran this test on the former and current Police Jury plans. At least four of the twelve Police Jury districts drawn in the 1991 Police Jury plan failed this compactness test. Joiner suggested at deposition that at least two of the twelve districts (Districts 10 and 12) would fail this compactness test because they were "elongated." Joiner also stated that Districts 1 and 4 of the plan were not compact either.

140. Former Parish Administrator Ramsey, who was involved in the redistricting process, noted that the northern parish district (District 4) in the 1991 Police Jury plan takes up almost half of the geographic area of the parish. According to Ramsey, this district contains an inordinate number of roads and drainage areas to be maintained, and is "impossible to represent."

141. The plan adopted by the school board in 1992 does not have a public school in each district. The district lines do not correspond with school attendance zones within Bossier Parish.

142. Black students comprise approximately 29 percent of the student enrollment in the Bossier Parish school system. As of March 24, 1994, there are five schools in the Bossier Parish School District in

which the majority of the students are black: Bossier Elementary (77.1% black), Butler Elementary (74.2% black), Plain Dealing Elementary (77.7% black), Plain Dealing Middle/Senior High School (76.9% black), and Plantation Park Elementary School (51.9% black). Bossier and Butler Elementary Schools are the only two schools within the proposed Bossier City black-majority district in the NAACP School Board redistricting plan (or within similar alternative districts drawn by William Cooper). Plain Dealing Elementary and Plain Dealing High School are the only schools within the proposed black-majority district in the northern portion of the parish under the NAACP plan (or similar alternative districts drawn by Cooper). Indeed, the two Plain Dealing schools are the only two schools north of Benton in the Bossier Parish school system.

143. During the 1992 redistricting process for the Bossier Parish School Board, black citizens offered an alternative redistricting plan which created two black-majority districts, one in the northern part of the parish, and one within Bossier City. This plan, the "NAACP Plan," demonstrates that, using Census blocks, two contiguous districts with a black voting age population majority can be drawn within Bossier Parish for the Bossier Parish School Board.

144. The NAACP Plan employs the same types of physical and artificial features as in the School Board's plan: roads, streams, railroads, corporate limits, and, within Bossier City, the limits of Barksdale Air Force Base. The NAACP Plan uses streams to a greater extent than the School Board Plan; the district boundaries correlate with streams in at least 14 locations, as opposed to only 6 in the School Board



Plan. Overall, in the use of logical, traditional features such as roads, streams, etc., as boundary markers, the NAACP Plan is not significantly different from the School Board plan.

145. Census blocks are certainly irregular and varied in shape within Bossier Parish.

146. Curves in the NAACP Plan District 2 lines occur immediately north of Plain Dealing, within the Bodcau Wildlife Management Area in the east central part of the parish, and in the areas immediately north and east of the Black Bayou Reservoir. All of these district curves represent boundaries which follow local stream patterns and rural roads. Irregularly shaped Census blocks (and therefore irregularly shaped district boundaries) are more likely to occur in rural parishes within hilly terrain, such as Bossier Parish, than in relatively flat areas such as in the southwestern part of Louisiana.

147. After the School Board adopted its proposed plan, defendant-intervenors' expert, William Cooper, drew other plans containing two black-majority districts, one in the northern part of the parish and one within Bossier City. Maps and descriptions of these plans are included as exhibits to the direct testimony of William Cooper. These plans include one drawn for the recent *Knight v. McKeithen* litigation (Cooper, Exh. 1); and one drawn with a view toward maximizing compactness (Cooper, Exh. 3). Both these plans, particularly the latter, also demonstrate that, using Census blocks, two contiguous black-majority districts can be drawn within Bossier Parish for the Bossier Parish School Board. Both plans comply with the principles of one person, one vote, fairly reflecting minority voting strength, and contiguity.

148. The northern parish minority district in the Cooper Plan, District 8, is similar in shape and location to District 2 of the NAACP Plan, but is less elongated and more compact. The two are sufficiently similar so that the possibility of creating a district like the Cooper District 8 was readily discernible. However, Cooper District 8 is shorter and more compact.

149. District 4 in the 1991 Police Jury Plan (the Proposed School Board Plan) is similar to District 8 shown in Exhibits 1 and 3 to the direct testimony of William Cooper, to the extent that both are large districts centered in the north-central portion of the parish. District 4 in the Proposed School Board Plan has a land area of 424 square miles, 49.6 percent of the entire Bossier Parish area. District 8C in Exhibit 3 has a land area of 252 square miles, 29.5 percent of the entire parish area. District 4 in the Proposed School board Plan is 33.5 miles long from the extreme northwest to the extreme southeast. District 8C from Exhibit 3 is 34.5 miles long from the extreme northwest to the extreme southeast. Thus, each alternative minority district for northern Bossier Parish shown in Exhibits 1 and 3 is virtually identical in length to the School Board's proposed district configuration and covers 40 percent less land area.

150. The minority district configuration within Bossier City used by Cooper is an acceptable configuration from the standpoint of district shape.

151. Using the current precinct lines in Bossier Parish in place at the time of the 1992 School Board redistricting, the NAACP Plan creates 46 precinct splits, and the Cooper Plan causes 27. Using the 1990



precinct lines in existence at the time of the 1990-1991 Police Jury redistricting, the NAACP Plan causes 22 precinct splits, and the Cooper Plan causes 25.

152. It is impossible to draw, on a precinct level, a black-majority district in Bossier Parish without cutting or splitting existing precinct lines.

*History of Black Electoral Success in Bossier Parish after 1980*

153. No black candidate ever has been elected to the Bossier Parish School Board. Since 1980, black candidates have run for election to the School Board on four occasions.

154. In the October 17, 1981 primary election for School Board District C (28.1 percent black in total population based upon the 1980 Census), black candidate Floyd Coleman received 389 votes (38.5 percent), white candidate Annie Johnston received 401 votes (39.7 percent), white candidate Ken Larsen received 150 votes (14.8 percent) and white candidate Nonnie Moak received 71 votes (7.0 percent). Coleman was defeated in the November 28, 1981 runoff election, in which he received 584 votes (40.5 percent) and his white opponent, Annie B. Johnston, was elected with 858 votes (59.5 percent).

155. In the September 27, 1986 election for School Board District J (30.1 percent black in total population based upon the 1990 Census), black candidate Jeff Darby was defeated. Darby received 343 votes (45.7 percent) and his white opponent, Ruth Sullivan (who was the incumbent) was elected with 408 votes (54.3 percent).

156. In the October 6, 1990 election for School Board District J (30.1 percent black in total population based upon the 1990 Census), black candidate Johnny Gipson was defeated. Gipson received 430 votes (46.8 percent) and his white opponent, Ruth Sullivan (who was the incumbent), was reelected with 489 votes (53.2 percent), a difference of 59 votes. District J has a white majority and consists of two precincts.

157. In the April 3, 1993 special election for School Board District K (11.3 percent black in total population based upon the 1990 Census), a black candidate, Jerome Blunt (who was the appointed incumbent), was defeated. Blunt received 93 votes (23.9 percent) and his white opponent, Juanita Jackson, was elected with 296 votes (76.1 percent).

158. Since 1980, black candidates also have sought election to the Bossier Parish Police Jury; only one black candidate has been elected to the Bossier Parish Police Jury since 1980.

159. In the October 22, 1983 election for Police Jury District 7 (29.3 percent black in total population based on the 1980 Census), black candidate James Abrams received 358 votes (22.1 percent), white candidate Jerry Baker received 385 votes (23.8 percent) and white candidate Pete Glorioso won with 875 votes (54.1 percent).

160. In the October 22, 1983 election for Police Jury District 10, black candidate Jerome Darby received 407 votes (33 percent), black candidate Johnny Gipson received 260 votes (21 percent), and white candidate Tom McDaniel received 568 votes (46 percent). Darby prevailed in the November 19, 1983



runoff election with 328 votes (53.2 percent) to McDaniel's 289 votes (46.8 percent).

161. In 1983, Police Jury District 10 was 37.9 percent black in total population based upon the 1980 Census, and consisted of two precincts: 2-15 and 2-16. Precinct 2-15 included Barksdale Air Force Base and population areas adjacent to the base; precinct 2-16 also was comprised of population areas adjacent to the base.

162. Many of the residents in and around Barksdale Air Force Base are military population who do not vote. Police Jurors have testified that, as a result, the proportion of actual voters on election day in District 10 who are black is closer to 45 percent, and may even be a majority.[3] As a further result of the inclusion of the military base area in District 10, many of the white voters in that district are from areas outside Bossier Parish and outside Louisiana. According to police jurors, because of that area's distinctive character, black community leaders "have a good chance" of being elected in the district. The circumstances described above are unique to this area

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[3] According to the 1990 Census, the total population of Precinct 2-15 (in 1990) is 5,440; the total voting age population of the precinct is 3,703, of whom 61 percent were non-Hispanic white and 32 percent were non-Hispanic black. The Census block that comprised the Air Force Base portion of the precinct in 1990 contained a total population of 3,327, of whom 75 percent were non-Hispanic white and 22 percent were non-Hispanic black. If that Census block is removed from the precinct, the total voting age population is 1,447, of whom 46 percent are non-Hispanic white and nearly 50 percent non-Hispanic black. As of April 29, 1989, there were 1,229 registered voters in Precinct 2-15, of whom 55 percent were white and 44 percent were black.

of the parish and therefore to districts that include this area.

163. According to the plaintiff's expert, most of the Air Force base personnel do not vote in Bossier Parish. Out of approximately 6,000 military personnel and dependents, it is not unusual to have only 100 or so votes cast in a local election. In effect, Darby's local neighborhood is electing the Police Juror for that district; in that sense, the district is a "stealth district," according to Joiner. Many military retirees also settle permanently in this area. The bulk of these retirees are not from Bossier Parish originally, and thus would tend on average to vote in a less polarized way.

164. In the October 24, 1987 primary election for Police Jury District 10, the black incumbent, Jerome Darby, was reelected with 506 votes (60.5 percent). Another black candidate, Johnny Gipson, received 146 votes (17.4 percent) and the white candidate, Tom McDaniel, received 185 votes (22.1 percent).

165. In the only election held to date under the 1991 redistricting plan from the Police Jury (on October 19, 1991), black incumbent Jerome Darby was reelected without opposition.

166. In the October 19, 1991 election for Police Jury District 7 (43.87 percent black in total population according to the 1990 Census), the white incumbent, Pete Glorioso was reelected with 1,099 votes (64.5 percent). His black opponent, Leonard Kelly, received 604 votes (35.5 percent).

167. Black candidates experienced limited success in municipal election contests against white opponents in Bossier Parish during the 1980s. In two instances in which a black candidate was elected to municipal office in the 1980s, however, he was unsuccessful in seeking reelection in the 1990s.



168. Bossier City, which includes more than half the population of Bossier Parish, is the largest municipality wholly contained in the parish. According to the 1990 Census, Bossier City had a total population of 52,721 of whom 40,895 (77.57 percent) were non-Hispanic white persons and 9,463 (17.95 percent) were non-Hispanic black persons.

169. In the March 30, 1985 election for Bossier City Council District 3 (17 percent black in total population based on the 1990 Census), black candidate Odis Easter was defeated with 214 votes (17.2 percent) to white candidate Wanda Bennett's 1,033 votes (82.8 percent).

170. In the April 1, 1989 election for Bossier City Councilman at Large (two positions), black candidate Don Rushing came in last with 2,222 votes (11.84 percent) against three white candidates.

171. In the April 1, 1989 election for Bossier City Council District 4 (18.9 percent black in total population based on the 1990 Census), black candidate Earl Smith came in last with 137 votes (7.4 percent) against two white candidates.

172. In the April 1, 1989 election for Bossier City Council District 2 (25.6 percent black in total population based on the 1990 Census), black candidate Jeff Darby advanced to the runoff after receiving 356 votes (33.27 percent) against two white candidates. In the April 29, 1989 runoff, Darby was elected with 631 votes (51.47 percent) against his white opponent, Donald Brown, who received 595 votes (48.5 percent).

At the time of the election, District 2 was similar in configuration to Police Jury District 10 and included Barksdale Air Force Base and adjacent population.

173. In the October 16, 1993 special election for Bossier City Council District 2 (which was reduced to 24.3 percent black in total population under the 1993 redistricting plan), black incumbent Jeff Darby was defeated with 416 votes (46.7 percent) to 474 votes (53.3 percent) received by his white opponent, Jim Sawyer. Under the 1993 plan, much of the Barksdale Air Force Base area was removed from the district.

174. Black candidates also have run against white candidates from municipal office in Haughton. According to the 1980 Census, Haughton had a total population of 1,510 of whom 1,034 (68.48%) were non-Hispanic white persons and 456 (30.20%) were non-Hispanic black persons. In Haughton, elections for the Board of Aldermen are at large, in which five seats are to be filled and each voter has five votes to cast.

175. The April 7, 1984 Haughton Alderman election featured 11 candidates, three of whom were black. Black candidate James Bell, who received the highest number of votes (396), was elected along with two white candidates, Conrad Isom and Shirley Stephens, who received 357 and 341 votes, respectively. Black candidate Cashie Cole, Jr., who received 237 votes, was forced into a run-off with three white candidates—John D. Garland, Jr. (213 votes), Billy Joe Maxey (230) votes) and M.H. Walker, Jr. (228 votes). The third black candidate, Johnny Ruffin, who received 211 votes, did not receive enough votes to advance to the runoff.



176. In the May 5, 1984 runoff election for Haughton Alderman, Cashie Cole Jr. was elected with 236 votes, but he subsequently lost his bid for reelection. In October 1992, he finished sixth out of a field of seven candidates with only 13.9 percent of the votes cast.

177. In the October 1991 election for Haughton Mayor, black candidate Mark Hill placed last with 67 votes (10.8 percent). White candidate George J. Hunter received 97 votes (15.6 percent) and the white incumbent, Cecil L. Blackstock, was reelected with 458 votes (73.6 percent).

178. According to the 1990 Census, the Town of Benton had a total population of 2,047 of whom 1,166 (56.96 percent) were non-Hispanic white persons, 84[illegible] (41.33 percent) were non-Hispanic black persons and 35 (1.71 percent) were other minorities.

170. In the March 10, 1992 election for Mayor of Benton, black Candidate Thelma Harry received 218 votes (36.2 percent), white candidate Joe Stickell was elected with 378 votes (62.8 percent) and another white candidate, Ronny P. Vaughn, received 6 votes (1.0 percent).

180. Black candidates have won elections in Bossier Parish from majority-white districts.

*Racially Polarized Voting Patterns*

181. Police Juror Burford's understanding in 1991 was that at least 80 percent of black and white voters voted from candidates of their own race, and that the crossover rate, *i.e.*, voting for candidates of the other race, was generally 20 percent although sometimes it could be even lower. To some extent, voting patterns in Bossier Parish are affected by racial preferences.

182. As one element of proof of the existence of racially polarized voting in Bossier Parish, the United States presented the analysis and testimony of Dr. Richard Engstrom. Dr. Engstrom is a professor of political science at the University of New Orleans with extensive experience in the statistical analysis of electoral behavior. Dr. Engstrom has been recognized as an expert witness in this field in numerous vote dilution cases in federal courts and has served as court-appointed expert in this regard.

183. Dr. Engstrom's analysis covered the only parish-wide election for local office in recent years (1988 primary election for a seat on the 26th Judicial District Court), as well as the last three elections for seats on the Bossier Parish School Board in which voters in the respective districts were presented with a choice between black and white candidates (1986, 1990 and 1993). In addition, he examined the vote in the six other elections in the parish during the 1990s in which voters were presented with a choice between black and white candidates. Dr. Engstrom's analysis sought to determine the extent to which black voters supported black candidates and the extent to which white voters supported white candidates.

184. Bivariate ecological regression analysis is based upon the correlation between the proportion of the votes received in each precinct and the proportion of black or white voters in each such precinct. Based upon his analysis of the 1988 primary election for the seat on the 26th Judicial District Court, Dr. Engstrom found that there was a very consistent relationship between the percentage of those signing in to vote who were black in each precinct and the percentage of the votes received by the black candidate,



Bobby Stromile, in the precincts. The estimate of support for Stromile among black voters was 79.2 percent, while the estimate of support for Stromile among white voters was only 28.9 percent.

185. Homogeneous precinct analysis simply tabulates the votes cast in precincts with overwhelmingly black and overwhelmingly white populations. These analyses support the estimates produced by ecological regression analysis. In the 1988 primary election, over 90 percent of the people signing in to vote were white in 25 of the 43 precincts in Bossier Parish. Stromile received only 31.3 percent of the votes cast in those 25 precincts, while his white opponent received 69.9 percent of the vote in those precincts. There were no homogeneous black precincts in the parish (the highest percentage of black voters among those signing in to vote was only 75.1 percent).[4]

186. Dr. Engstrom examined two elections for School Board District J: one in 1986, in which Jeff Darby was the black candidate who competed with one white candidate, and one in 1990, in which Johnny Gipson was the black candidate, who competed against the same white candidate. District J was comprised of only two precincts and thus does not provide sufficient data to perform a regression analysis. Precinct 2-15 was racially mixed and Precinct 2-16 was homogeneously white. In Precinct 2-16, 97.4 percent of those signing in to vote in 1990 where white and 99.2 percent of those registered to vote in September of 1986 were white (sign-in data by race are not available for elections prior to 1988). In both these elec-

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[4] The plaintiff does not dispute the assertions in paragraphs 183 through 185, but maintains that they are irrelevant.

tions, precinct 2-16 supported the white candidate. Gipson received 31. 8 percent of the votes cast in that precinct in 1990 and Darby received 26.6 percent in 1986. Both Gipson and Darby won, however, in Precinct 2-15 in their respective elections. In Precinct 2-15, 48.9 percent of those signing in to vote in 1990 were black and 48.9 percent of those registered to vote in September 1986 were black. Gipson received 73.5 percent of the votes cast in Precinct 2-15 in 1990 and Darby received 75.9 percent of the votes cast in that precinct in 1986. The contrast in candidate support as between these two precincts suggests that the black candidates were the choice of the black voters in these elections, but were not the choice of the white voters.

187. In the 1993 special election for School Board District K (11.3 percent black according to the 1990 Census), in which the appointed black incumbent, Jerome Blunt, was defeated by a white opponent, only nine of the 430 people who signed in to vote were black. Even if every vote Blunt received had been cast by a white voter and every black voter who signed in to vote had cast a ballot for Blunt's opponent, Blunt still would have received only 37.1 percent of the white votes in the election. While it is not possible to determine whether Blunt was the choice of black voters, he clearly was not the choice of white voters.

188. Dr. Engstrom also examined the vote in police jury and municipal elections during the 1990s in which voters were presented with a choice between black and white candidates.

189. In the 1991 election for Police Jury District 7, a black candidate, Leonard Kelly, was defeated by the white incumbent, who received 64.5 percent of the



vote. A regression analysis of the five precincts produced an estimated black vote for Kelly of 41.5 percent and a white vote of 33.8 percent. Only two precincts were racially homogeneous and both were white. He received 38.3 percent of the votes in those precincts. Thus, Kelly was not the choice of either black or white voters.

190. In the 1993 Bossier City special election, Jeff Darby, the black incumbent in District 2, faced one white opponent and black candidate Will Jones ran in District 1 against two white opponents. This was the first election held under the new 1993 redistricting plan for the Bossier City Council. The election was delayed until October 16, 1993 because the new redistricting plan had not been precleared in time for the regularly scheduled April 6, 1993 election. Turnout was extremely low in these two districts. Fewer than 25 percent of the eligible registered voters cast ballots in the District 2 contest and approximately 29 percent of the eligible voters in District 1 signed in to vote in the election.

191. Bossier City Council District 2 is comprised of three whole precincts and portions of four others. Based upon Dr. Engstrom's regression analysis, Darby is estimated to have received 61.0 percent of the votes cast by blacks and 41.3 percent of the votes cast by whites. The correlation coefficient for the relationship between the percentage of the votes received by Darby and the racial composition of the precincts in District 2 is .549. This coefficient, based on only seven precincts, is not statistically significant. In the homogeneous white precincts, Darby received 45.7 percent of the votes cast.

192. All five of the precincts in Bossier City District 1 were homogeneously white. The percentage of people signing in to vote in these precincts who were black ranged from 2.3 to 8.2. Although it is not possible to determine whether the black candidate was the choice of black voters, it is clear that he was not the choice of white voters, having received only 10.1 percent of the votes cast in this election.

193. In the 1992 mayoral election for the Town of Benton, blacks comprised 38.3 percent of the people signing in to vote and the black candidate, Thelma Harry, received 36.2 percent of the votes cast. Because the votes were cast in a single precinct, it is not possible to product estimates of the votes by race.

194. In 1992, Cashie Cole, Jr., a black incumbent on the Haughton Board of Aldermen, was defeated in his bid for reelection. All of the votes cast in the election were cast in a single precinct so that no estimates of the votes by race can be produced. Blacks comprised 25.6 percent of the people signing in to vote and Cole finished sixth in a field of sever candidates, with 13.9 percent of the votes cast in this at-large election.

195. In the 1991 mayoral election in Haughton, also held in the one precinct, 25.4 percent of those signing in to vote were black and the black candidate, Mark Hill, finished last among the three candidates, with only 10.8 percent of the votes cast.

196. Of the 14 elections since 1980 in which black candidates have run against white candidates for a single-member district or for mayor, only two candidates have won. Jerome Darby defeated a white opponent on two occasions in Police Jury District 10, which included population in and around Barksdale



Air Force Base, and Jeff Darby defeated white candidates in Bossier City District 2, which also included population in and around Barksdale Air Force Base in 1989, but lost his bid for reelection after much of that population was removed from the district in 1993.

*Relationship Between Depressed Levels of Socioeconomic Status and Political Participation Among Black Citizens of Bossier Parish*

197. According to pre-election statistics for the April 3, 1993 election prepared by the Department of Elections and Registration, the total number of registered voters in Bossier Parish was 40,356 of whom 33,755 (83.6 percent) were white and 6,279 (15.6 percent) were black. Thus, as of the April 3, 1993 election, 70.1 percent of the 1990 Census white voting age population were registered to vote, while only 58.5 percent of the 1990 Census black voting age population were registered to vote. Current voter registration statistics reveal similar disparities. As of October 28, 1994, Bossier Parish had 38,870 registered voters, of whom 32,474 (83.5 percent) were white and 6,044 (15.5 percent) were black. Thus, 67.5 percent of the white voting age population were registered to vote, while only 56.3 percent of the black voting age population were registered to vote.

198. Turnout statistics prepared by the Department of Elections and Registration also reveal a pattern of lower turnout rates among black voters than among white voters in Bossier Parish.

199. Education, income, housing and employment are considered standard measures of socioeconomic status. These factors repeatedly have been found to translate into political efficacy.

200. Black citizens of Bossier Parish suffer a markedly lower socioeconomic status than their white counterparts. This lower socioeconomic status is traceable to a legacy of racial discrimination affecting Bossier Parish's black citizens.

201. According to the 1990 Census, the per capita income of whites in Bossier Parish in 1989 was $12,966, while the per capita income of blacks in Bossier Parish in 1989 was $5,260.

202. According to the 1990 Census, the proportion of white families in Bossier Parish below the poverty level in 1989 was 6.8 percent, and the proportion of black families in Bossier Parish below the poverty level in 1989 was 40.2 percent.

203. According to the 1990 Census, the proportion of white persons in Bossier Parish below the poverty level in 1989 was 8.7 percent, and the proportion of black persons in Bossier Parish below the poverty level in 1989 was 42.7 percent.

204. According to the 1990 Census, 4.8 percent of white persons in Bossier Parish 25 years of age and older had less than ninth grade education, and 22.8 percent of black persons 25 years of age and older had less than a ninth grade education.

205. According to the 1990 Census, the proportion of white persons in Bossier Parish 25 years old and over who were at least high school graduates (including equivalency) was 83.3 percent, and the proportion of black persons in Bossier Parish 25 years old and over who were at least high school graduates (including equivalency) was 58.7 percent.

206. According to the 1990 Census, the proportion of white persons in Bossier Parish 25 years old and



over who had a least four years of college was 17.0 percent, and the proportion of black persons in Bossier Parish 25 years old and over who had at least four years of college was 8.1 percent.

207. According to the 1990 Census, the proportion of white persons in the labor force of Bossier Parish who were unemployed was 2.9 percent, and the proportion of black persons in the labor force of Bossier Parish who were unemployed was 9.1 percent.

208. According to the 1990 Census, 4.2 percent of the housing units in Bossier Parish occupied by white persons had no vehicle available, and 25.9 percent of the housing units occupied by black persons in Bossier Parish had no vehicle available.

209. According to the Census, the proportion of occupied housing units in Bossier Parish owned by their occupants was 70.6 percent among white persons and 49.4 percent among blacks.

210. According to the 1990 Census, 0.3 percent of owner-occupied housing units in Bossier Parish with a white householder lacked complete plumbing for exclusive use, whereas 7.2 percent of owner-occupied housing units with a black householder lacked such facilities. The percentage of black households without access to vehicles (25.9%) is over six times higher than the comparable percentage (4.2%) for white households.

211. According to the 1990 Census for Bossier Parish, the poverty rate for black persons (44.7%) is nearly five times the rate for white persons (9.1%). The per capita income of black persons ($5,260) is only 40 percent of that enjoyed by whites ($12,966). The

unemployment rate for black persons aged 16 and over (22.4%) is nearly four times that for whites.

212. According to the 1990 Census for Bossier Parish, the socioeconomic disparities are matched by similarly severe disparities in education. The percentage of black persons over 25 without a high school degree (40.6%) is over twice the comparable rate (16.7%) for whites.

213. The depressed socioeconomic and educational levels of black persons within Bossier Parish, coupled with their limited access to vehicular transportation, makes it harder for blacks to obtain necessary electoral information, organize, raise funds, campaign, register, and turn out to vote, and this in turn causes a depressed level of political participation for black persons within Bossier Parish.

*History of Official Racial Discrimination*

214. Slavery was sanctioned by law in Louisiana prior to the ratification of the Thirteenth Amendment and vestiges of discrimination persist which affect the rights of black persons to register, to vote or otherwise participate in the democratic process.

215. In 1896, 126,849 black persons and 153,174 white persons were registered to vote in Louisiana, according to the 1902 Report of the Secretary of State of Louisiana.

216. In 1896, the Louisiana legislature adopted two new laws designed to disenfranchise black voters. One law provided a complex new Australian ballot and prohibited election officials from assisting illiterates. The other required all voters to reregister using a complex application from, prohibited explanation of application questions, and facilitated wholesale



purges by either registrars or party officials of individual voters who managed to register successfully. Discriminatory application of the new laws reduced black registration by 90 percent, leaving only 10 percent of adult black males on the rolls. J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven, Ct., Yale University Press, 1974), 160-63.

217. The State of Louisiana's Constitutional Convention of 1898 imposed a "grandfather" clause as well as educational and property qualifications for voter registration which were designed to limit black political participation.

218. Implementation of the disfranchising devices in the 1898 constitution reduced blacks to about 4 percent of the state's registered voters, although they made up approximately half the state's population. *United States v. State of Louisiana*, 225 F. Supp. 353, 373 (E.D. La. 1963). *See generally*, Richard Engstrom, *et al.*, *Louisiana*, in *Quiet Revolution in the South* 103-135 (Chandler Davidson and Bernard Grofman, eds., 1994).

219. On March 17, 1900, 5,320 black persons and 125,438 white persons were registered to vote in Louisiana, according to the 1902 Report of the Secretary of State of Louisiana.

220. In 1921, the state Democratic Party established, pursuant to state law, an all-white primary which was used until 1944.

221. In 1921, the state amended its constitution and replaced the "grandfather" clause with a requirement that an applicant "give a reasonable interpretation" of

any section of the federal or state constitution. The United States Supreme Court in *Louisiana v. United States*, 380 U.S. 145 (1965), held this "interpretation" test to be one facet of the state's successful plan to disenfranchise its black citizens.

222. Following the invalidation of the all-white primary in 1944, the state adopted such electoral devices as citizenship tests, anti-single-shot laws, and a majority vote requirement for party officers. *Major v. Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983).

223. Following the decision of the U.S. Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), outlawing segregation in public schools, the Louisiana legislature in 1954 established a joint committee chaired by State Senator Willie Rainach. Popularly known as the "Segregation Committee," the committee's stated purposed was "to provide ways and means whereby our existing social order shall be preserved," in order "to maintain segregation of the races in all phases of our life in accordance with the customs, traditions, and laws of our State." *United States v. State of Louisiana*, 225 F. Supp. 353, 378 (E.D. La. 1963).

224. Senator Rainach was among the founders of the Louisiana Association of Citizens' Councils, which published in 1956 a pamphlet entitled "Voter Qualification Laws in Louisiana—The Key to Victory in the Segregation Struggle." In the pamphlet the organization urged its members to initiate a purge campaign to challenge the right to vote of "the great numbers of unqualified voters who have been illegally registered," and who, according to the pamphlet, "invariably vote in blocks and constitute a menace to the community." The pamphlet's subtitle



was: "A Manual of Procedure for Registrars of Voters, Police Jurors and Citizens Councils." The state government distributed the pamphlet to parish registrars with instructions to follow its guidelines as closely as possible. *United States v. State of Louisiana*, 225 F. Supp. 353, 378 (E.D. La. 1963).[5]

225. Published congressional hearings on the Voting Rights Act included quantitative evidence concerning racial discrimination in voter registration in Louisiana, drawn from the various federal court cases filed by the Department of Justice. In addition, the hearings reproduced evidence of racial disparities in educational expenditures by the state over several decades together with documentation that these disparities were a product of the state's official policy of racial discrimination in education. *Hearings Before the Committee on the Judiciary, United States Senate, Eighty-Ninth Congress, First Session . . . Part 2* (Washington, D.C., G.P.O., 1965), 1103-59, 1189, 1191-92, 1199-1201, 1208-10, 1220-21, 1224-26, 1229-34, 1250-52, 1263-70, 1280-81, 1412-41, 1447-55, 1479-84. Congress and the federal courts have concluded that such educational disadvantages, typically correlated with disparities in socioeconomic status, tend to depress voter registration and turnout, as well as other forms of political participation. S. Rep. No. 97-417, at 29, citing *White v. Regester*, 412 U.S. 755, 768 (1973), and *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir. 1977) (en banc).

226. In 1954, the year before adoption of the Voting Rights Act, 14 percent of the nonwhite voting-age

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[5] The plaintiff does not dispute the assertions in paragraphs 214 through 223, but maintains that they are irrelevant.

population in Louisiana was registered to vote, yet 86 percent of the white voting-age population was on the registration rolls. United States Commission on Civil Rights, *Political Participation* (Washington, D.C., G.P.O., 1968), 242-43. This disparity was the result of a series of discriminatory election laws, according to the United States Supreme Court, which enjoined further use of the state's requirement that prospective voters demonstrate to the satisfaction of local registrars that they could understand or interpret a passage from the state or federal constitutions. *Louisiana v. United States*, 380 U.S. 145, 147-51 (1965). This registration test, like its predecessors, was racially neutral on its face but had been administered in a racially discriminatory manner. *Id.* at 150, 153.

227. The State of Louisiana and its subjurisdictions, including Bossier Parish, are subject to the preclearance provision (Section 5) of the Voting Rights Act of 1965 because in 1965 the state employed a "test or device," as defined in the Act, as a prerequisite to register to vote and less than 50 percent of the state's voting age population (at the time, 21 years of age or older) voted in the 1964 presidential election.

228. Since 1965, the United States Attorney General has designated twelve Louisiana parishes, including Bossier Parish, which was designated on March 23, 1967, for the appointment of federal examiners pursuant to Section 6 of the Voting Rights Act, 42 U.S.C. section 1973d.

229. In 1968, Louisiana altered its policy prohibiting the use of at-large elections for parish police juries and school boards by the adoption of two statutes enabling both types of local governing bodies to



use parish-wide elections rather than realign their single-member districts. The state was required by the decision of the U.S. Supreme Court in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), to submit these changes for review by the Department of Justice pursuant to Section 5 of the Voting Rights Act. On June 26, 1969, the Attorney General objected under Section 5 to the two state enabling acts on the grounds that at-large elections would in many instances, if implemented, "have the effect of discriminating against Negro voters on account of their race." See objection letter of June 26, 1969, objecting to Acts 445 and 561 of 1968, and the discussion in *Zimmer v. McKeithen*, 485 F.2d 1297, 1301-02 n.7 (5th Cir. 1973) (en banc).

230. In 1971, the legislature incorporated multi-member districts in the Shreveport metropolitan areas, including Bossier Parish, and in other areas, into its redistricting plans for both state senate and house. The Attorney General objected under Section 5 of the Voting Rights Act, citing both the dilution caused by multi-member districting and the fragmentation of black voting strength in each area. The U.S. District Court hearing a constitutional challenge to the state's redistricting plan observed that had the Attorney General not objected, he would have found the districting plan unconstitutional because it was malapportioned, diluted minority voting strength, and employed "gerrymandering in its grossest form." *Bussie v. Governor of Louisiana*, 333 F. Supp. 452, 454 (E.D. La. 1971). The court ordered legislative elections to be held under its own interim plan, relying exclusively on single-member districts.

231. A U.S. Commission on Civil Rights publication, *The Voting Rights Act: Ten Years After* (Washington, D.C., 1975), listed 12 parishes, including Bossier Parish, in which minority plaintiffs filed lawsuits challenging police jury and school board redistricting plans enacted in the 1970s.

232. The Department of Justice objected to the 1991 redistricting plans for the Louisiana state house, in part, because the Justice Department determined that the district alignments appeared to minimize black voting strength in and around Bossier Parish.

233. Public accommodations and facilities in the State of Louisiana were not open to members of both races until the late 1960s.

234. The State of Louisiana maintain a dual university system until at least 1981.

235. After 1954, school boards in Louisiana failed to abolish *de jure* segregation in the public schools voluntarily, and it was necessary to for local federal courts to issue decrees in order to obtain compliance with federal law.

236. The Bossier Parish School Board is the defendant in *Lemon v. Bossier Parish School Board*, C.A. No. 10,687 (W.D. La.), in which it was found liable for intentionally segregating the public schools of Bossier Parish in violation of the Fourteenth Amendment to the United States Constitution. *Lemon v. Bossier Parish School Board*, 240 F. Supp. 709 (W.D. La. 1965).

237. The Bossier Parish School Board for years sought to limit or evade its desegregation obligations. The School Board sought to assign black children of



Barksdale Air Force Base personnel to black schools without a right to transfer to white schools, claiming that they were "federal children" and not within the "jurisdiction" of the school district. Judge Wisdom rejected the School Board's "new and bizarre excuse for rationalizing [its] denial of the constitutional right of Negro school children to equal educational opportunities as white children." *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 849 (5th Cir. 1967).

238. The Fifth Circuit also rejected the school district's subsequent attempt to implement a "freedom of choice plan," *Hall v. St. Helena Parish School Board*, 417 F.2d 801 (5th Cir. 1969), and after "protracted litigation" subsequently rejected yet another inadequate remedial plan proposed by the district. *Lemon v. Bossier Parish School Board*, 421 F.2d 121 (5th Cir. 1970). The School Board then attempted to assign students to one of two schools in Plain Dealing based on their success on the California Achievement Test. The Fifth Circuit rejected this effort as well. *Lemon v. Bossier Parish School Board*, 444 F.2d 1400 (5th Cir. 1971).

239. In 1979, the School Board filed a motion seeking a declaration of unitary status and release from further court supervision. The motion was denied.

240. Notwithstanding the requirements of the order in *Lemon* concerning the desegregation of its faculty and staff, since 1980, the School Board has assigned an increasingly disproportionate number of black faculty to schools with predominantly black student enrollments and has reduced the percentage of black teachers in the school district from 14 percent to less than 10 percent. As of March 1994, while

fewer than 10 percent of the district's teachers were black, the School Board assigned faculties that were more than 20 percent black to the five predominantly black schools in the district. The School Board assigned a faculty that was more than 70 percent black to one school, Butler Elementary. The School Board assigned more than half of its 113 black teachers to seven of its 28 schools and one or fewer black teachers to ten of its schools.

241. Since, 1980, despite the Bossier Parish School Board's affirmative duty to desegregate, the number of elementary schools with predominantly black student enrollments has increased from one to four.

242. As of the 1993-94 school year, the Bossier Parish School Board assigned predominantly black student enrollments to five of its 27 regular schools. Despite the fact that the overall racial composition of the school district's student population is 29 percent black, four of these schools have student bodies that are more than 70 percent black.

243. As of the 1993-94 school year, the School Board also maintained six schools in which the white enrollment was greater than 80 percent, and two schools in which the white enrollment is greater than 90 percent. Of the 16 regular elementary schools, four had predominantly black student enrollments and five had student enrollments that were more than 80 percent white.

244. Blacks and whites today are treated identically by public officials in registering to vote, filing for public office and voting in primaries and general elections. No black individual or black person representing a black organization has been denied the right



to speak to the Bossier Parish School Board at its pubic meetings.

245. No black in the past two decades has filed a suit or an official protest alleging that his right to register to vote, file for public office, or to vote in a primary or general election has been hampered or interfered with.[6]

246. On July 26, 1991, Gary W. Moore, a resident of Bossier Parish, pled guilty to conspiring to oppress, threaten and intimidate minority individuals of the State of Louisiana in the free exercise and enjoyment of rights, including the right to vote, secured to them under the Constitution and laws of the United States. As set forth in the Bill of Information to which Moore pled guilty, Moore willfully conspired to join with others, under the cover of darkness, to burn numerous crosses at chosen places in and around Shreveport. July 27, 1991, *Shreveport Times*, *Meridian Star*; see also, May 30, 1991. *Shreveport Times*.

247. On July 26, 1991, Herbert D. Haynes, a resident of Bossier Parish, pled guilty to conspiring to oppress, threaten and intimidate minority individuals of the State of Louisiana in the free exercise and enjoyment of rights, including the right to vote, secured to them under the Constitution and laws of the United States. As set forth in the Bill of Information to which Haynes pled guilty, Haynes willfully conspired to join with others, under the cover of darkness, to burn numerous crosses at chosen places in and around Shreveport. July 27, 1991, *Shreve-*

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[6] The defendant and defendant-intervenors do not dispute this assertion, but maintain that it is irrelevant.

*port Times*, *Meridian Star*; see also, May 30, 1991, *Shreveport Times*.

248. On July 12, 1991, Edward Wayne McGee, a resident of Bossier Parish, pled guilty to conspiring to oppress, threaten and intimidate minority individuals of the State of Louisiana in the free exercise and enjoyment of rights, including the right to vote, secured to them under the Constitution and laws of the United States. As set forth in the Bill of Information to which McGee pled guilty, McGee willfully conspired to join with others, under the cover of darkness, to burn numerous crosses at chosen places in and around Shreveport. July 27, 1991, *Shreveport Times*; July 28, 1991, *Meridian Star*; see also, May 30, 1991, *Shreveport Times*.[7]

CONCLUSIONS OF LAW

249. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, prohibits a covered jurisdiction like the Bossier Parish School Board from implementing any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" unless and until it has proven to either this Court or the Attorney General that the voting change at issue "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."

250. In an action for a declaratory judgment under Section 5, the burden of proof is on the plaintiff. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

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[7] The plaintiff does not dispute the assertions in paragraphs 245 through 247, but maintains that they are irrelevant.



251. To sustain that burden, the Bossier Parish School Board must demonstrate the absence of both discriminatory purpose and discriminatory effect in the adopting and maintenance of its 1992 redistricting plan. *City of Rome v. United States*, 446 U.S. 156, 172 (1980); *City of Richmond v. United States*, 422 U.S. 358, 378-379 (1975). In addition, the plan may not be precleared pursuant to Section 5 if implementation of the plan will result in a violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973.

252. The 1992 redistricting plan is not retrogressive to minority voting strength compared to the existing benchmark plan and therefore will not have a discriminatory effect, as that term has been construed by the Supreme Court in *Beer v. United States*, 425 U.S. 130 (1975). The reductions here are *de minimis*. But this does not end the inquiry. As this Court has recognized, "nonretrogression is not the only test for compliance with the Voting Rights Act." *Busbee v. Smith*, 549 F. Supp. 494, 516 (D.D.C. 1982). Even if a plan increases black voting strength, plaintiff is not entitled to the declaratory judgment unless it can also demonstrate the absence of a racially discriminatory purpose. *Ibid.*

253. The inquiry into whether the plan has a discriminatory purpose requires an examination into any circumstantial or direct evidence of intent that is available. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). "(I)nvidious discriminatory purpose may often be inferred from the totality of the relevant facts." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Rele-

vant areas of inquiry include: (1) the historical background of the decision; (2) the sequence of events leading up to the action taken; (3) procedural departures from the customary decisional process; (4) substantive departures from the normal process; and (5) the legislative or administrative history, including contemporary statements by the members of governing body, minutes of their meetings, and any testimony by the decision makers regarding their intent. *Village of Arlington Heights v. Metropolitan Housing Development Corp., supra*, 429 U.S. 267-68; see *Garza v. County of Los Angles*, 918 F.2d 763, 771 (9th Cir. 1990). In obtaining a declaratory judgment that the proposed plan is free of any racially discriminatory purpose, the plaintiffs must show the absence of such factors.

254. The impact of the official action on the minority group often provides "an important starting point" to the determination of whether invidious intent is implicated. *Village of Arlington Heights v. Metropolitan Housing Development Corp., supra*, 429 U.S. at 266; *Busbee v. Smith, supra*, 549 F. Supp. at 517 (three-judge court). As Justice Stevens observed in *Washington v. Davis*, "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." 426 U.S. at 253 (concurring opinion).

255. The objective of protecting incumbents' opportunities for reelection is a well recognized political reality of the redistricting process and is not *per se* evidence of racial animus. *Rybicki v. State Board of Elections of Illinois*, 574 F. Supp. 1082, 110-11, n.81 (N.D. Ill. 1982). See also *Burns v. Richardson*, 384 U.S. 73, 89, n.16 (1966). But, where, as here, the motive of protecting incumbency necessarily involves the adoption of a plan that denies minority voters an equal opportunity to elect their preferred candidates to the school board, it may be viewed as evidence of racially discriminatory intent. *Ketchum v. Byrne*, 740 F.2d 1389, 1408 (7th Cir. 1984). It has been held in similar circumstances that "the requirements of incumbency are so closely intertwined with the need for racial dilution that an intent to maintain a safe . . . district for [a white incumbent] is virtually coterminous with a purpose to practice racial discrimination." *Rybicki v. State Board of Elections of Illinois, supra*, 574 F. Supp. at 1109. Here, plaintiffs must demonstrate that such incumbency considerations did not prevent the drawing of a minority district.



256. A finding of racially discriminatory purpose does not require a finding of racial hatred or animus. *Garza v. County of Los Angeles, supra*, 918 F.2d at 778 n.1 (Kozinski, J. concurring in relevant part):

> The lay reader might wonder if there can be intentional discrimination without an invidious motive. Indeed there can. A simple example may help illustrate the point. Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief,

you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

257. Section 5 preclearance of the Bossier Parish School Board's redistricting plan also must be denied if the plan violates Section 2 of the Voting Rights Act, as amended, 42 U.S. C. 1973. If this Court concludes that the plaintiff has failed to meet its burden of proof on the issue of purpose or effect, preclearance must be denied and there will be no need to decide whether the plan also violates Section 2 of the Act. However, should this Court find that the Bossier Parish School Board has met its burden of proof on the issues of purpose and retrogression, this Court must also determine whether the plan constitutes a violation of Section 2 for which Section 5 preclearance must be denied. See S. Rep. No. 97-417, 97th Cong., 2d Sess. 12 n.31 (1982); 28 C.F.R. 51.55(b)(2).

258. Section 2 of the Voting Rights Act prohibits any denial or abridgment of the right to vote on account of face or color. Section 2 provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, on in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).



> (b) A violation of subsection (a) is established, if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. 1973 ("Section 2"). See also S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982).

259. Absent proof of intentional discrimination, where vote dilution in violation of Section 2 occurs, "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986) (emphasis in original). In *Gingles*, which involved a challenge to a multimember district system, the Court enunciated three threshold factors that must be present to prove a vote dilution claim under Section 2: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to

defeat the minority's preferred candidate. 478 U.S. at 49-51. The Supreme Court recently held that these prerequisites also apply to challenges to redistricting plans under Section 2. *Growe v. Emison*, 113 S. Ct. 1075 (1993); *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993).

260. When Congress amended Section 2 it intended courts to take "a 'functional' view of the political process," and to make "a searching practical evaluation of the 'past and present reality.'" *Thornburg v Gingles*, *supra*, 478 U.S. at 45; see also *Gomez v. City of Watsonville*, 863 F.2d 1407, 1413 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989).

261. The purpose of the geographic compactness criterion is to determine whether the challenged election plan is causing the violation. As the Supreme Court explained:

> Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential . . . because it is the smallest political unit from which representatives are elected.

*Thornburg v. Gingles*, *supra*, 478 U.S. at 50, n.17 (emphasis in original). According to the Supreme Court in *Gingles*, the issue is whether there is an alternative to the challenged plan that would provide the minority group with the potential to elect candidates of choice.



262. Voting is racially polarized when racial minority voters vote differently from white voters. *Thornburg v. Gingles*, *Supra*, 478 U.S. at 53 n.21. The Supreme Court explains that "[t]he purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive until and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Thornburg v. Gingles*, *supra*, 478 U.S. at 56. Racially polarized voting is legally significant if minority voters are cohesive in support of their candidates and those candidates are usually defeated by white bloc voting. *Ibid.* The reasons why those racial differences in voting patterns occur are not relevant to the basic polarization inquiry. *Thornburg v. Gingles*, *supra*, 478 U.S. at 61-74; 478 U.S. at 100 (O'Connor, J., concurring).

263. According to the Supreme Court in *Gingles*, the statistical method of ecological regression analysis, used here by the expert witness for the United States, is the standard method for establishing racially polarized voting and in most circumstances it produces valid and reliable estimates of voting behavior for racial groups. See, *e.g.*, *Thornburg v. Gingles*, *supra*, 478 U.S. at 52-53 & n.20; *Campos* v. *City of Baytown*, *supra*; *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987); *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1331-1334 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). In addition, homogeneous precinct analysis (also known as extreme case analysis) and anecdotal testimony can provide further evidence on the polarization issue. See *Romero v.*

*City of Pomona*, 883 F.2d 1418 1423; *Garza v. County of Los Angeles*, *supra*, 756 F. Supp. at 1332.

264. The racial polarization inquiry in vote dilution cases should focus on contest between minority candidates and non-minority candidates. A focus on such elections appropriately ties together the two key Senate Report factors: racial polarization and "the extent to which members of the minority group have been elected to public office." S. Rep. No. 97-417, *supra*, at 29 & n.115. In *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), the Fifth Circuit ruled, "implicit in the *Gingles* holding is the notion that black preference is determined from elections which offer the choice of a black candidate." *Id.* at 503. See also *Smith v. Clinton* 687 F. Supp. 1310, 1316-17 (E.D. Ark. 1988), *summarily aff'd*, 488 U.S. 988 (1988) (three-judge court).

265. Generally, where it is available, the best evidence to measure racially polarized voting is the elections conducted for positions within the challenged election system. Analysis of elections outside the challenged system is appropriate, however, if viable minority candidates have been deterred from seeking office. *Cf. Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d, 1201, 1208-1209 n.9 (5th Cir. 1989); *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (5th Cir. 1984); *Garza v. County of Los Angeles*, *supra*, 756 F. Supp. at 1329.

266. After the preconditions have been established, the court must examine the "totality of circumstances" to determine whether minority group members have an equal opportunity to participate in the political process and elect representatives of their choice. *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994).



Typical factors relevant to an inquiry into the totality of the circumstances include, but are not limited to, the following:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority community to register, to vote, or otherwise participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health which hinder their participation in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals; and,

7. the extent to which members of the minority group have been elected to office in the jurisdiction.

S. Rep. 97-417, 97th Cong., 2d Sess. 28-29 (1982). In addition, the Senate Report listed two additional factors that may have some probative value as part of the evidence to establish a violation of Section 2:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting or standard, practice or procedure is tenuous.

S. Rep. 97-417, 97th Cong., 2d Sess. 28-29 (1982). "If present, the[se] other factors . . . are supportive of, but *not essential to*, a minority voter's claim." *Thornburg v. Gingles*, *supra*, 478 U.S. at 48-49 n.15 (emphasis in original). There is no requirement that all, or any particular number of these factors be shown in order to prove a violation of Section 2. Rather, the court should "determine, based 'upon a searching practical evaluation of the 'past and present reality,' . . . whether the political process is equally open to minority voters." *Thornburg v. Gingles*, *supra*, 478 U.S. at 79.

267. A violation of Section 2 also is shown if the evidence demonstrates that the challenged election plan was adopted or has been maintained with a discriminatory purpose. *Garza v. County of Los Angeles*, 918 F.2d 763, 770 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991); see *McMillan v. Escambia County*, 748 F.2d 1037, 1046-47 (5th Cir. 1984); *United States v. Marengo County Commission*, 731 F.2d 1546, 1553 (11th Cir.), *appeal dismissed, cert. denied*,



469 U.S. 976, (1984); *Dillard v. Baldwin County Board of Education*, 686 F. Supp. 1459, 1460, 1467-69 (M.D. Ala. 1988); S. Rep. No. 97-417, 97th Cong., 2d Sess. 27 (1982). Courts since *Thornburg* have continued to analyze intentional discrimination claims independently of the "results" test. *Garza v. County of Los Angeles*, *supra*, 918 F.2d at 766; see also *Overton v. City of Austin*, 871 F.2d 529, 540-541 (5th Cir. 1989); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1552-1553 (11th Cir. 1987), *cert. denied sub nom. Duncan v. City of Carrollton*, 485 U.S. 936 (1988); and *Brown v. Bd. of Comm'rs of City of Chattanooga*, 722 F. Supp. 380 (E.D. Tenn. 1989). Such proof of intentional discrimination also establishes a violation of the Fourteenth and Fifteenth Amendments. *Rogers v. Lodge*, *supra*, 458 U.S. at 618.

[Original document contains no ¶¶ 268-281.]

282. No redistricting plan can be designed and drawn for the Bossier Parish School Board with one or more black-majority districts without splitting and cutting precincts in violation of Louisiana Revised Statutes, Title 17, Section 71.3. Under Louisiana law, the Bossier Parish Police Jury is the governing authority for Bossier Parish and is vested with the authority and duty of redistricting after each ten year census. Under Louisiana law, the precinct lines it draws may not be cut, split or otherwise violated by the Bossier Parish School Board if the School Board is the same size as the Police Jury. This law is clearly set out in Louisiana Revised Statutes, Title 17, Section 71.3.

283. The majority opinion in *Shaw v. Reno*, ____ U.S. ____, 125 L.Ed.2d 511 (1993), contends that racial

gerrymandering separates the citizens on the basis of race. *Shaw* stands for the legal proposition that a redistricting plan which rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, without sufficient justification, is a violation of the Equal Protection Clause of Fourteenth Amendment to the Constitution of the United States.

284. Vote dilution is meaningful only with respect to a norm to be established; in order to decide whether an electoral system has made it harder for minority voters to elect candidates they prefer, a court must have an idea in mind of how hard it should be for minority voters to elect their preferred candidates under an acceptable system.

285. It is fiction to conclude that only blacks can govern fairly other blacks.



**APPENDIX E**

[DOJ Logo]

U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20035

Office of the Assistant Attorney General

[Aug. 30, 1993]

Mr. W.T. Lewis
Superintendent of Bossier
Parish Schools
P.O. Box 2000
Benton, Louisiana 71006-2000

Dear Mr. Lewis:

This refers to the 1992 redistricting plan and the renaming of districts from letters to numbers for the Bossier Parish School District in Bossier Parish, Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your response to our request for additional information on June 29, 1993.

The Attorney General does not interpose any objection to the renaming of the districts from letters to numbers. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

We cannot reach the same conclusion with regard to the proposed redistricting plan. We have considered carefully the information you have provided, as well as Census data and information and comments received from other interested parties. According to the 1990 Census, black residents comprise 20.1 percent of the total population in Bossier Parish. The Bossier Parish School District, which is coterminous with the parish, is governed by a twelve member school board elected from single-member districts. Under both the existing and proposed districting plans, not one of the twelve single-member districts is majority black in population. Currently, there are no black members on the school board.

In light of the pattern of racially polarized voting that appears to prevail in parish elections, the proposed plan, adopted by the parish police jury and recommended by the school board's consultant, would appear to provide no opportunity for black voters to elect a candidate of their choice to the school board. We note that under the proposed plan, the school board district with the highest black population percentage, District 4, is 45 percent black. The information provided in your submission indicates that prior to the adoption of the proposed redistricting plan, members of the black community appeared before the school board and requested that the board draw a redistricting plan that would fairly reflect black voting strength in the parish by creating two majority black districts.

We are mindful of the fact that we granted Section 5 preclearance to an identical redistricting plan for the Bossier Parish police jury in July 1991. However, in reviewing the submitted redistricting plan for the



school board, we have taken into account new information, particularly the 1991 police jury elections held under the 1991 redistricting plan and the 1992 redistricting process for the school board. During that process, it appears that an alternative plan that would have provided for two districts which are approximately 62 and 56 percent black in total population was presented to the school board at a public hearing.

Our analysis of this alternative, preferred by members of the black community, shows that black residents are sufficiently numerous and geographically compact so as to constitute a majority in two single-member districts. Apparently, the school board rejected this plan and engaged in no efforts to accommodate the requests of the black community, instead adopting the redistricting plan adopted by the parish police jury. While the school board is not required by Section 5 to adopt any particular plan, it is not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice.

We have considered the school board's explanation that the proposed plan was adopted in order to avoid voter confusion by having the same districting plans for both school board and police jury elections. In addition, the school board has indicated that the need to avoid split precincts, pursuant to state law, limited its ability to adopt a redistricting plan with majority black districts.

We do not find either of these arguments persuasive. We understand that during the 1980's the school board and police jury used different districting plans as a result of the reapportionment of the respective districts following the 1980 Census and no evidence

has been presented to show that voter confusion resulted. And while we are aware that state law prohibits precinct splits in school board redistricting plans, we also note that state law allows police juries to realign precincts and such a realignment in Bossier Parish could have facilitated the development of a school board redistricting plan with majority black districts. The information that you have provided discloses no evidence that the school board ever sought a precinct realignment that would have allowed the drawing of such a plan.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See *Georgia v. United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In addition, preclearance must be withheld where a change presents a clear violation of Section 2. 28 C.F.R. 51.55(b)(2). In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the proposed redistricting plan meets the Act's preclearance requirements. Therefore, on behalf of the Attorney General, I must object to the 1992 school board redistricting plan.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judg-



ment from the District of Columbia Court is obtained, the 1992 redistricting plan continues to be legally unenforceable. *Clark v. Roemer*, 111 S. Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.45.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the Bossier Parish School District plans to take with respect to this matter. If you have any questions, you should call Gaye Hume (202-307-6302), an attorney in the Voting Section.

Sincerely,

/s/ JAMES P. TURNER
JAMES P. TURNER
Acting Assistant
Attorney General
Civil Rights Division

**APPENDIX F**

[DOJ Logo]

U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20035

Office of the Assistant Attorney General

[December 20, 1993]

James M. Bullers, Esq.
District Attorney
26th Judicial District
Bossier-Webster Parishes
P.O. Box 69
Benton, Louisiana 71006

Dear Mr. Lewis:

This refers to your request that the Attorney General reconsider the August 30, 1993, objection under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the 1992 redistricting plan for the Bossier Parish School District in Bossier Parish, Louisiana. We received your request on September 7, 1993; supplemental information was received on October 20, 1993.

We have reconsidered our earlier determination in this matter based on the information and arguments the school board has advanced in support of the request. According to the 1990 Census, black persons comprise 20.1 percent of Bossier Parish's total population and 17.6 percent of its voting age population. The school board is elected from twelve single-member districts; none of the districts in the 1992 redistricting plan subject to our objection have a black majority. As explained in the August 30, 1993, objection letter, our analysis of your initial submission showed that, given the apparent pattern of racially polarized voting in parish elections, black voters will be unable to elect a candidate of their choice to the school board under the objected-to redistricted plan. Our review of the redistricting process further indicated that the school board made no effort to accommodate the request of black community that the board develop a plan with two black-majority districts and gave no consideration to such a plan developed by the NAACP.



In support of its request for reconsideration, the school board continues to argue that it is impossible to draw a redistricting plan with black-majority districts without splitting precincts in violation of state law. We considered this argument during our prior review and found this explanation unpersuasive. Our objection letter specifically noted that the school board could have, but did not, seek a realignment of voting precincts by the Bossier Parish Police Jury that would have facilitated the development of a plan that fairly reflects black voting strength while addressing these state law concerns. The information made available to us indicates that the school board has not requested that the police jury make any necessary realignment of precincts.

In addition, your letter, citing *Shaw v. Reno*, 113 S. Ct. 2816 (1993), argues that the alternative plan developed by the NAACP is "so irrational on its face that the plan could be understood only as an effort to segregate voters into separate voting districts because of their race." However, the school board pro-

vides no basis in fact nor explanation for this assertion, and our analysis of the plan does not support your conclusion. Moreover, the school board does not appear to dispute the fact that black residents are sufficiently numerous and geographically compact in the parish so that two black-majority districts could be created. You contend only that it is not possible to do so given current precinct configurations, which the school board has not sought to alter. In these circumstances, *Shaw v. Reno* does not provide a legal basis for withdrawing our objection, and the school board's reliance upon that decision appears to be pretextual.

In light of the considerations discussed above, I remain unable to conclude that the Bossier Parish School District has carried its burden of showing the submitted change has neither a discriminatory purpose nor a discriminatory effect. See *Georgia v. United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). Therefore, on behalf of the Attorney General, I must decline to withdraw the August 30, 1993, objection to the 1992 redistricting plan for the school board.

As we previously advised, the school board retains the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the objected-to change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, we remind you that unless and until a judgment from the District of Columbia Court is obtained, the objection remains in effect and the objected-to change continues to be legally unenforceable. *Clark*



*v. Roemer*, 111 S. Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.48(d).

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the Bossier Parish School District plans to take concerning this matter. If you have any questions, you should call Gaye Hume (202-307-6302), an attorney in the voting Section.

Sincerely,

/s/ JAMES P. TURNER
JAMES P. TURNER
Acting Assistant
Attorney General
Civil Rights Division

**APPENDIX G**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 94-1495
(LHS (USCA), GK, JR)

BOSSIER PARISH SCHOOL BOARD, PLAINTIFF

*v.*

JANET RENO, DEFENDANT,

and

GEORGE PRICE, ET AL., DEFENDANT-INTERVENORS

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[Filed: July 6, 1998]

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*NOTICE OF APPEAL*

Notice is hereby given that, pursuant to 28 U.S.C. 1253 (which provides for appeals directly to the United States Supreme Court from decisions of three-judge courts), 28 U.S.C. 2101(b) and 42 U.S.C. 1973c, defendant Janet Reno hereby appeals to the United States Supreme Court from the final Order of the United States District Court for the District of Columbia (three-judge court) filed on May 1, 1998 and entered on May 4, 1998, granting preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, for the 1992 redistricting plan of plaintiff Bossier Parish School Board.



Respectfully submitted,

WILMA LEWIS
United States Attorney

ANITA HODGKISS
Deputy Assistant
Attorney General

/s/ GAYE L. HUME
ELIZABETH JOHNSON
REBECCA J. WERTZ
GAYE L. HUME
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ROBERT A. KENGLE
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## APPENDIX H

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section.

Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.



## APPENDIX I

### 28 C.F.R. 51.55a (1997)

**Consistency with constitutional and statutory requirements.**

(a) *Consideration in general.* In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b), sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgement on account of race, color, or membership in a language minority group.